Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

FIRST ADVANTAGE INSURANCE, INC. AND
FIRST NATIONAL BANK OF DENHAM SPRINGS,
Petitioners

v.

DOUGLAS D. GREEN, COMMISSIONER OF INSURANCE,
THE LOUISIANA ASSOCIATION OF LIFE
UNDERWRITERS, THE PROFESSIONAL INSURANCE
AGENTS OF LOUISIANA, THE INDEPENDENT
INSURANCE AGENTS OF LOUISIANA,
Respondents

On Petition for Writ of Certiorari to the Court of Appeal for the First Circuit, State of Louisiana

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PETITION FOR WRIT OF CERTIORARI

A. SHELBY EASTERLY, III
(Counsel of Record)
Elizabeth C. Dougherty
EASTERLY & PITTMAN
142 Del Norte Ave.
Denham Springs, LA 70726
(504) 664-0001
Attorneys for Petitioner

1320.

QUESTIONS PRESENTED

1. Whether a federal banking statute that grants authority to national banks operating in towns of less than 5,000 inhabitants to sell all types of insurance, as an agent, (12 U.S.C. sec. 92), preempts a state statute prohibiting national banks from carrying on such activities.

2. Whether a state banking law prohibiting all banks from selling insurance is a law enacted for the purpose of regulating the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. sec. 1012(b).

3. Whether 12 U.S.C sec. 92 "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. sec. 1012(b).

LIST OF PARTIES

The names of all parties to the proceeding below appear in the caption of this case with the exception of Respondent James H. "Jim" Brown, Commissioner of Insurance, as successor to Louisiana's former Commissioner of Insurance, Douglas D. Green.

Petitioner First National Bank of Denham Springs is a national banking association holding Charter Number 15344 issued by the Comptroller of the Currency, United States Department of the Treasury.

Petitioner First Advantage Insurance, Inc. is a wholly-owned subsidiary of First National Bank of Denham Springs.

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INSURANCE AGENTS OF LOUISIANA,
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On Petition for Writ of Certiorari
to the
Court of Appeal
First Circuit
State of Louisiana

PETITION FOR WRIT OF CERTIORARI

The petitioners, First Advantage Insurance, Inc. and First National Bank of Denham Springs, respectfully request that this Court issue a Writ of Certiorari to review the judgment of the Court of Appeal, First Circuit, State of Louisiana. The Supreme Court of the State of Louisiana denied petitioners' timely application for Writ of Certiorari on May 5, 1995.

OPINIONS BELOW

The denial of the writ of certiorari by the Louisiana Supreme Court is reproduced at Pet. App. B, infra, 36a. The opinion of the Louisiana Court of Appeal for the First Circuit (Pet. App. A, infra, 1a) is reported at 652 So.2d 562. The opinion of the Nineteenth Judicial District Court of the State of Louisiana (Pet. App. C, infra, 37a) is unreported. The unreported Ruling of the Commissioner of Insurance is reproduced at Pet. App. D, infra, 44a. The opinion of the United States Court of Appeals for the Sixth Circuit that conflicts with the decision in this case (Pet. App. E, infra, 50a) is reported at 44 F.3d 388.

JURISDICTION

The application to the Supreme Court of the State of Louisiana for Writ of Certiorari to the Court of Appeal, First Circuit, State of Louisiana was denied May 5, 1995. This Court has jurisdiction under 28 U.S.C. section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution Art. VI, Cl. 2 (The Supremacy Clause) provides in part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof
> ***
> shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The United States Constitution Art. I, Section 8 provides:

> Congress shall have the Powers ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof.

3. 12 U.S.C. 92, 39 Stat. 753, provides:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last

> preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: **Provided, however,** That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: **And provided further,** That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

4. Title 15 U.S.C. Section 1012(b), 59 Stat. 34, (part of the McCarran-Ferguson Act) provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, ..., unless such Act specifically relates to the business of insurance

***

5. Title 12 C.F.R. 5.34 provides in part:

***

(c) A national bank may engage in activities which are a part of ... banking by means of an operating subsidiary corporation.
(d) Policy:

***

(2) ... all provisions of federal banking laws and regulations applicable to the operations of the parent bank shall be equally applicable to the operations of its operating subsidiary.

6. Louisiana Statutes Annotated:

a) Title 6 "Banks and Banking", LSA-R.S. 6:2, provides in part:

(1) "Bank" means any state bank or any national bank.

b) LSA-R.S. 6:121(B)(2) provides in part:

***

(2) Notwithstanding any other provision of this title, the commissioner [of Financial Institutions] shall not authorize any bank, bank holding company, or subsidiary thereof to engage in any insurance activity except an insurance activity in which a bank

> may engage pursuant to the provisions of R.S. 6:242(A)(6).
>
> ***

c) LSA-R.S. 6:242(A)(6) provides in part:

> A. In addition to the general corporate powers conferred in R.S. 6:241 and the powers conferred by other provisions of the laws of this state, a state bank shall have the following banking powers and those incidental to the exercise of these powers:
>
> ***
>
> (6) To act as the agent for any insurance company authorized to do business in this state ... but only with respect to credit insurance .... Notwithstanding any other provisions of this Title, no bank shall engage or be authorized to be engaged in any insurance activity that is not expressly permitted by this Subsection (A)(6).[1]
>
> ***

d) LSA-R.S. 6:513(3) states in part:

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[1] This statute was revised by Acts 1989, No. 134, Acts. 1990, No. 637, and Acts 1993, No. 281. The revisions have no substantive effect on the issue presented in this case. The printed version above is the law in effect when this case began.

It shall be unlawful:

***

(3) For any bank holding company or subsidiary thereof to engage in any such insurance activity except an insurance activity in which a bank may engage.

e) Title 22 of the Louisiana Statutes Annotated, the "Insurance Code", LSA-R.S. 22:1214(12) provides in part:

The following are declared to be unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

***

(12) Any violation of any prohibitory law of this state.

f) LSA-R.S. 22:1360(A) provides in part:

Any person aggrieved on account of any official action ... of the commissioner of insurance, ..., may have the court review any order of the commissioner of insurance ... The petition for such review shall be filed only in the district court in and for the parish of East Baton Rouge ... .

STATEMENT

Title 12 of the United States Code, "Banks and Banking", is Congress' expression of supreme Law of the Land regarding national banks. In Section 92, (12 U.S.C. 92),

Congress created the right for national banks in communities with population of 5,000 inhabitants or less, "under such rules and regulations as may be prescribed by the Comptroller of the Currency, [to] act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located ...." Currently, approximately 179 national banks in fifteen States are conducting insurance activities pursuant to 12 U.S.C. 92. Owensboro National Bank, et al. v Moore, 803 F.Supp, 24 (E.D. Ky.1992).

However, at least fifteen other States[2] have laws purporting to restrict the ability of national banks to sell insurance within the State's borders to the full extent permitted under 12 U.S.C. 92. The Louisiana Court of Appeal's decision has upheld Louisiana's statute barring national banks from acting as general agents for the sale of insurance. The court reasoned that the McCarran-Ferguson Act, 15 U.S.C. 1012(b), immunizes Louisiana law from federal preemption by 12 U.S.C. 92. The court's conclusion rests squarely on an erroneous interpretation of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), and this Act's impact on 12 U.S.C. 92, an issue yet to

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[2] See Conn. Gen. Stat. Ann. sec. 38a-775 (West 1992 & Supp. 1994); Fla. Stat. Ann. sec. 626.988(2) (West 1984 & Supp. 1995); Ky. Rev. Stat. Ann. sec. 287.030 (Michie 1988); La. Rev. Stat. Ann. sec. 6:121(B)(2) (West 1954 & Supp. 1995); Me. Rev. Stat. Ann. tit. 24-A sec. 1514-A (West 1990 & Supp. 1994); Mass. Ann. Laws ch. 175, sec. 174E (Law. Co-op. 1987 & Supp. 1995); Nev. Rev. Stat. Ann. sec.683A.110 (Michie 1992 & Supp. 1993); N.H. Rev. Stat. Ann. sec. 384:16-b(II)(1983); N.J. Stat. Ann. sec. 17:3C-1 (West 1993); Pa. Stat. Ann. tit. 40, sec.281(b) (1992); R.I. Gen. Laws sec. 27-3-46, 27-3-47 (1994); Tenn. Code Ann. sec.56-6-201 (1994); Tex. Ins. Code. Ann. art. 21.07-3 sec. 5(h) (West 1993); Vt. Stat. Ann. tit. 8, sec. 4811 (1993); W.Va Code sec 31A-8C-1, 31A-8C-2(f) (1994).

be decided by this Honorable Court.

This Louisiana decision is in direct conflict with the United States Court of Appeals, Sixth Circuit in Owensboro National Bank v Stephens, 44 F.3d 388 (6th Cir.1944) (reproduced at Pet. App. E, infra, 50a), upholding the right of national banks to act as insurance agents under federal law. The Sixth Circuit specifically held that 12 U.S.C. 92 preempts similar state law prohibitions. The direct result of this decision is that national banks in the four states of the Sixth Circuit can operate insurance agencies in certain small towns without concern that state regulators will revoke their licenses under state statutes. However, the result of the Louisiana decision is that First National, its subsidiary First Advantage, and other national banks in Louisiana, similarly situated, cannot.

Coincidentally, the United States Court of Appeals for the Eleventh Circuit has also rendered a decision in direct conflict with the Sixth Circuit's holding in Owensboro. The case is Barnett Bank of Marion County, N.A. v Gallagher, 43 F.3d 631, (11th Cir.1995)(No. 93-3508) (reproduced as Pet. App. F, infra, 79a), and a separate petition for Writ of Certiorari is pending in the matter under this Honorable Court's docket number 94-1837.

The importance of the federal laws at issue here is underscored by the active intervention of the Executive Branch of the Federal Government, through the Comptroller of the Currency, ("OCC"). Throughout all three proceedings, the Comptroller of the Currency presented the view that 12 U.S.C. 92 preempts conflicting state law under both traditional federal preemption analysis and within the meaning of the McCarran-

Ferguson Act. The basis of the OCC's argument rests on the unambiguous language of Section 92, reflecting the traditional and current trend of Congress and this Honorable Court to preserve the autonomy of national banks.[3]

Petitioners have presented their case to the proper state tribunals and have exhausted all remedies save review by this Honorable Court. When the Louisiana Supreme Court exercised its discretion, refusing to grant review, the Court of Appeal effectively became the state court of last resort for the petitioners. Furthermore, the decision of the Louisiana Court of Appeal rests on that court's interpretation of two federal statutes, 12 U.S.C. 92 and 15 U.S.C. 1012(b). This erroneous interpretation forms the basis of the Ruling by the Commissioner of Insurance (Pet. App. D, infra, 44a) and the holding of the district court. (Pet. App. C, infra, 38a-40a, and see generally App. A, infra, 1a). Therefore, considerations by this Honorable Court governing review on Writ of Certiorari are two-fold. First, this petition presents a decision of a state court of last resort interpreting federal law in direct conflict with a decision of a United States Court of Appeals. Second, this petition presents a state court's erroneous interpretation of 12 U.S.C. 92 that has not yet been, but should be, settled by this Honorable Court.

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[3] McCulloch v Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), where this Court established the constitutionality of national bank legislation and held, in part, that state legislation interfering with the exercise of these federal powers is invalid; United States Nat'l Bank of Oregon v Independent Ins. Agents, Inc., 113 S.Ct. 2173 (1993) holding unanimously that 12 U.S.C. 92 "remains in force" (113 S.Ct. at 2187).

We seek a writ of certiorari to resolve this conflict and interpret these important federal questions. As recognized by the Louisiana Court of Appeal in its opinion:

> The issues raised in this appeal are the most recent conflicts in the long running turf battle on the part of two powerful industries, namely banking and insurance, each of which is subject to governmental regulation. The jurisprudence reveals that these battles are occurring in states around the country, and different courts are arriving at different results. Ultimately, the various questions raised will have to be answered by the United States Supreme Court.

(Pet. App. A, infra, 35a).[4]

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[4] Also, the intervenors and defendants urged the Louisiana Supreme Court to let this Honorable Court decide this case. In the intervenors' opposition brief to the Louisiana Supreme Court, "Opposition of Intervenors/Respondents to Application for Writ of Certiorari or Review to the Court of Appeal, First Circuit, State of Louisiana," the opposition argued:

> Indeed, as a practical matter, [the Louisiana Supreme Court] need not resolve a conflict between two federal courts. The parties in [Owensboro and Barnett Bank] are seeking review in the United States Supreme Court, and the Supreme Court is likely to grant review to resolve this purely federal matter on which the federal circuits are now divided.
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> ***
>
> For this reason alone, the Court should deny the application.

As discussed in IV, infra, this Louisiana case is the most appropriate

1. Factual Background

Petitioner First Advantage Insurance, Inc., ("First Advantage"), is a wholly-owned subsidiary of First National Bank of Denham Springs, ("First National").[5] First National is a national banking association holding charter number 15344, issued by the Comptroller of the Currency in 1964. First National is a wholly-owned subsidiary of Hancock Holding Company, a federally regulated bank holding company subject to the authority of the Board of Governors of the Federal Reserve System.[6]

In March, 1989, pursuant to 12 U.S.C. 92, First National sought approval from the Comptroller of the Currency to establish an operating subsidiary to engage in general de novo insurance activities in communities of less than 5,000 inhabitants where the bank operated branch banks. Shortly

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[5] 12 C.F.R. 5.34 states in part:

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(c) A national bank may engage in activities which are part of ... banking by means of an operating subsidiary corporation.

(d) Policy

***

(2) ...all provisions of federal banking laws and regulations applicable to the operations of the parent bank shall be equally applicable to the operations of its operating subsidiary.

[6] In March of 1995, First Denham Bancshares, Inc., the former owner of First National, and also a bank holding company, was merged into Hancock Holding Company.

thereafter, the Comptroller of the Currency approved the establishment of First Advantage Insurance, Inc. and its proposed activities in five qualified Louisiana towns. First Advantage was then licensed by the Commissioner of Insurance for the State of Louisiana to act as an agent for the sale of insurance.

2. Administrative Proceeding

On June 20, 1990, the Independent Insurance Agents of Louisiana, the Professional Insurance Agents of Louisiana, and the Louisiana Association of Life Underwriters ("Intervenors") filed a complaint with the Commissioner of Insurance for the State of Louisiana. As a result, the Commissioner ordered petitioners to show cause why the license of First Advantage should not be revoked. Despite opinion letters from the Comptroller of the Currency and Louisiana's Commissioner of Financial Institutions supporting the autonomy of national banks to act pursuant to 12 U.S.C. 92, Louisiana's Commissioner of Insurance revoked First Advantage's general agent's license. (Pet. App. D, infra, 44a). The Commissioner based his authority to control the activities of national banks in Louisiana on his interpretation of the McCarran-Ferguson Act. He held that the "permission" granted national banks and their subsidiaries to sell insurance pursuant to 12 U.S.C. 92 was subject to state restrictions. (Id at 45a). Concluding that "permission or authority to act does not equal license to act," the Commissioner revoked First Advantage's general agent's license. (Id at 47a).

3. Louisiana District Court Proceeding

Petitioners appealed this ruling to the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana.[7] Interventions were filed by the insurance agents' respective trade associations.

The District Court affirmed the ruling of the Commissioner, (Pet. App. C, infra, 37a), based on the court's similar interpretation of the McCarran-Ferguson Act. (Id at 38a-40a). The court also addressed the federal preemption issue, both traditional preemption and preemption within the meaning of the McCarran-Ferguson Act. The court held that 12 U.S.C. 92 does not preempt the Louisiana statutes for two reasons: first, Section 92 "is permissive;" and second, it "does not expressly prescribe Federal supremacy in its application." (Id at 41a).

4. Louisiana Court of Appeal Proceeding

Petitioners appealed, and the Louisiana Court of Appeal affirmed the revocation of First Advantage's agent license. (Pet. App. A, infra, 1a-2a). In an inconsistent decision, the Court

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[7] LSA-R.S. 22:1360(A) states in part:

> Any person aggrieved on account of any official action ... of the commissioner of insurance, ..., may have the court review any order of the commissioner of insurance .... The petition for such review shall be filed only in the district court in and for the parish of East Baton Rouge ....

first acknowledged that the Louisiana statutes at issue directly conflict with 12 U.S.C. 92, (Id at 17a). The court then held that 12 U.S.C. 92 is "permissive" and, therefore, subject to state restrictions. (Id at 25a).

Next, the court concluded that the McCarran-Ferguson Act also immunizes the Louisiana banking statutes from preemption by 12 U.S.C. 92, because, under the McCarran-Ferguson Act two-part test: 1) the Louisiana banking statutes were enacted "for the purpose of regulating the business of insurance," and 2) 12 U.S.C. 92 does not "specifically relate to the business of insurance." (Pet. App. A, infra, 24a, 27a).

Struggling to reach its conclusion, the Louisiana court called on this Honorable Court to provide the answer to these "very complicated issues". (Pet. App. A, infra, 35a).[8]

5. Louisiana Supreme Court Ruling

The Supreme Court for the State of Louisiana denied petitioners' application for Writ of Certiorari on May 5, 1995. (Pet. App. B, infra, 35a).

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[8] See quote from the decision of the Louisiana Court of Appeal cited on page 11 of this petition.

REASONS FOR GRANTING THE WRIT

I

IRRECONCILABLE CONFLICTS EXIST BETWEEN THE LOUISIANA COURT AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This Louisiana decision is in direct conflict with the United States Court of Appeals for the Sixth Circuit in Owensboro National Bank v Stephens, supra. The issues presented necessitate resolution by this Honorable Court and constitute the logical sequel to United States Nat'l Bank of Oregon v Independent Ins. Agents, Inc., 113 S.Ct. 2173 (1993), where this Court unanimously held 12 U.S.C. 92 "remains in force" (113 S.Ct. at 2187).

The Sixth Circuit in Owensboro interpreted the McCarran-Ferguson Act as it applied to a Kentucky banking statute prohibiting general insurance agent activities by national banks. The court held the Kentucky statute is not a law "regulating the business of insurance" within the meaning of the McCarran-Ferguson Act and is, therefore, preempted by 12 U.S.C. 92, the conflicting federal statute.

The Sixth Circuit reasoned that, under the McCarran-Ferguson Act "the business of insurance" is made up of 'practices' and 'activities' that satisfy the criteria set forth by this Court in Union Labor Life Insurance Co. v Pireno, 458 U.S. 119 (1982). (Pet. App. E, infra, 58a). These criteria are:

> **first**, whether the practice has the effect of transferring or spreading a policyholder's risk; **second**, whether the practice is an integral part of the policy relationship between the insurer and the insured; and **third**, whether the practice is limited to entities within the insurance industry.

(Pet. App. E, infra, 58a-59a, quoting Pireno, 458 U.S. at 129).

Working within the interpretation given by this Honorable Court of part one of the McCarran-Ferguson test, i.e. whether the state law has the "end, intention, or aim of adjusting, managing, or controlling the business of insurance," United States Dep't of Treasury v Fabe, 113 S.Ct. 2210, 2210 (1993), the Sixth Circuit reasoned a state statute limiting "persons" eligible to sell insurance is not such a law. The court stated:

> Excluding a person from participation in an activity, ..., is different from regulating the manner in which an activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity.

(Pet. App. E, infra, 60a). Having concluded that 15 U.S.C. 1012(b) did not apply, the court chose not to evaluate whether 12 U.S.C. 92 "specifically relates to the business of insurance," and, thus, preempts conflicting state statutes within the meaning of the McCarran-Ferguson Act. (Pet. App. E, infra, p.61a).

The decision of the Louisiana Court of Appeal is in direct conflict with the Owensboro decision on two critical

points. First, regarding the first prong of the McCarran-Ferguson test, the Louisiana court found that state banking statutes, similar to the Kentucky statutes, were laws whose purpose was to regulate the business of insurance. (Pet. App. A, infra, 18a-24a). Contrary to the Sixth Circuit, yet purporting to base its reasoning on Fabe, supra, the Louisiana court stated in very broad terms:

> individuals or entities acting in the capacity of insurance companies relate so closely to their status as reliable insurers [that activities of this nature] are at the core of the 'business of insurance.'
>
> ***
>
> [state] statutes aimed at protecting or regulating this relationship [between the insured and the insurer], directly or indirectly, are laws regulating the business of insurance.

(Pet. App. A, infra, 23a). Thus, in direct conflict with the Sixth Circuit, the Louisiana court held the "business of insurance" within the meaning of 15 U.S.C. 1012(b) encompasses state banking statutes prohibiting insurance agent activities by national banks.

The second conflict between the Louisiana decision and the Sixth Circuit pertains to the Louisiana court's interpretation of 12 U.S.C. 92. The Louisiana court found that 12 U.S.C. 92 was "permissive," and therefore, subject to state regulations. (Pet. App. A, infra, 25a). On the other hand, the Sixth Circuit dismissed the same argument stating:

> Providing that a bank "may act" is no different than providing that a bank "shall have the power to act." Thus, the language of [Section] 92 does not permit the construction [that it is permissive.]

(Pet. App. E, infra, 56a).

Therefore, the Louisiana court's interpretations of 15 U.S.C. 1012(b) and 12 U.S.C. 92 conflict irreconcilably with the Sixth Circuit's Owensboro decision.

II

FEDERAL LAW AS APPLIED TO NATIONAL BANKS MUST BE UNIFORM

National banks are institutions of the federal government and must be governed by a uniform set of federal regulations. These federal regulations are often complemented by compatible state statutes[9] but must not be restricted by conflicting state regulations. To allow a state the freedom to restrict activities of national banks contrary to express federal authority is counter to the will of Congress, the interpretation by the Comptroller of the Currency of that agency's governing statutes, and opinions of this Honorable Court interpreting the Constitution of the United States.

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[9] Contracts and dealings of national banks are subject to the operation of general and nondiscriminating state laws which do not conflict with the letter or the general object and purposes of congressional legislation .... Farmers' & Mechanics' Bank v Dearing, 91 U.S. 29, 33 (1876).

The United States Congress has designated the Comptroller of the Currency ("OCC") as the federal authority responsible for regulating national banks. 12 U.S.C. Chapters 1 & 2, Sections 1-220. In his letter to the Louisiana Commissioner of Insurance opposing revocation of First Advantage's license, the OCC interpreted 12 U.S.C. 92 as a clear grant of authority, to the OCC, to allow national banks to sell insurance. (Pet. App. E, infra, 57a at note 2).

The OCC has vigorously supported this position. In addition to its opposition to the Louisiana Insurance Commissioner's Hearing below, the OCC voiced the same position as a plaintiff in District Court, Owensboro National Bank, et al., v. Moore, supra, and as appellee in the Sixth Circuit Court of Appeals, Owensboro, supra. In Barnett Bank, supra, the OCC submitted a declaration in support of the position of Barnett Bank to the District Court and filed a brief as amicus curiae on appeal, seeking reversal of the district court's finding. In all three cases, the OCC has clearly interpreted 12 U.S.C. 92 as creating a right that is not subject to contrary state law restrictions.

Furthermore, this Honorable Court in Nationsbank of North Carolina v Variable Annuity Life Insurance Co., 115 S.Ct. 810 (Nos. 93-1612 and 93-1613)(1995) recently held that courts should give deference to the Comptroller of the Currency's reasonable interpretation of 12 U.S.C. 92. By validating Title 12 as the source of authority for national banks, this Court remains steadfast to its traditional interpretation of the role of national banks. In 1819, this Court interpreted the Constitution of the United States as allowing Congress alone to regulate the role of national banks with regard to the several

states. McCulloch v Maryland, supra, at note 2. As a result of that decision, the notion that a state statute may limit activities of national banks, contrary to unambiguous authority from Congress, is repugnant to the United States Constitution art. I, section 8, the source of Congressional authority to adopt 12 U.S.C. 92, and to the United States Constitution art. VI, cl. 2, the Supremacy Clause.

Again in 1824, this Honorable Court held that national banks are "creatures of the federal government," and authority over national banks is derived from the federal government. Osborn v Bank of the United States, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824). Thus, the concepts of central authority and uniformity of national banking regulations is both the contemporary and traditional views of Congress, the OCC, and this Honorable Court.

Nevertheless, the Louisiana court held national banks are subject to regulation by state statutes that conflict with federal law. (Pet. App. A, infra, 27a; App. C, infra, 41a; and App. D, infra, 45a). In addition to usurping regulatory authority of the OCC, expressly given by Congress and supported by this Court, this Louisiana decision compounds the existing national uncertainty and lack of uniformity regarding the freedom of national banks to engage in authorized activities without concern of violating state regulations. As noted in the "Statement", supra at p.8, at least fifteen States currently have laws purporting to restrict the ability of national banks to sell insurance within the State's borders. As many as fifteen other states allow national banks to sell insurance pursuant to 12 U.S.C. 92, while several more states have enacted laws purporting to have varying degrees of regulation over national

banks with regard to banks' involvement in insurance.[10]

These conflicting decisions arising from state and federal tribunals underscore the extent of uncertainty and compelling need for uniform interpretation of these federal laws.

III

THE DECISION OF THE LOUISIANA COURT IS ERRONEOUS

The decision of the Louisiana court is derived from an inconsistent and erroneous interpretation of two federal statutes, 15 U.S.C. 1012(b) and 12 U.S.C. 92.

The most startling pronouncement of the Louisiana court is that the language of Section 92 is "permissive." Not only does this finding conflict with a decision by the United States Sixth Circuit, it is incorrect. Specifically, the court referred to the following language of Section 92,

> In addition to powers now vested in national banking associations ... any such association ..., **may**, under such rules and regulations as may be prescribed by the Comptroller of the Currency,

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[10] Several States apparently acknowledge the effect of Section 92 and exempt from a general prohibition any banks in municipalities of 5,000 or less population. See, e.g., Ark. Code Ann. sec. 23-64-203 (Michie 1994); Colo. Rev. Stat. sec. 10-2-221(2) (1994); Ga. Code Ann. sec. 33-3-23 (1992); N.M. Stat. Ann. sec. 59A-12-10 (Michie 1978 & Supp. 1994). See also, Miss Code Ann. sec. 83-17-229 (1972) (permitting insurance sales by lending institutions located in communities with populations of 7,000 or less).

> act as agent for fire, life, or other insurance company ...(emphasis added).

(Pet. App. A, infra, 16a-17a).

Section 92 has not been interpreted by this Honorable Court with regard to whether the authority created is absolute or permissive. However, if the interpretation of the Louisiana court is allowed to stand, every similarly written congressional statute, creating authority to be exercised at the discretion of federal administrative agencies, will possibly be subject to state regulation.

Instead, using ordinary rules of grammar, the highlighted word "may" is modified by the very next phrase, "under such rules and regulations as may be prescribed by the Comptroller of the Currency". As such, the sentence means that the power created for national banks is absolute, but the grant of authority is subject to the regulatory discretion of the Comptroller of the Currency.

The next error in the decision of the Louisiana court pertains to its interpretation of 15 U.S.C. 1012(b). More precisely, the issue before the Louisiana court was whether Section 92 "specifically relates to the business of insurance." In finding that Section 92 does not, the Louisiana court imposed its own unsupported test to interpret the meaning of "specifically relates" in 15 U.S.C. 1012(b). The court said that McCarran-Ferguson requires Section 92 to "expressly state" that it relates to the business of insurance (Pet. App. A, infra, 25a) and "expressly state" that it preempts conflicting state statutes. (Id at 25a). McCarran-Ferguson, however, has no

language requiring a federal statute to so state. McCarran-Ferguson only requires a federal statute to "specifically relate to the business of insurance" in order to preempt contrary state law. This Honorable Court has not determined the meaning of "specifically relates" within 15 U.S.C. 1012(b), and this important federal question should be answered. The lack of final resolution fosters situations such as the case in Louisiana where, as a result of the court's finding, national banks situated in Louisiana are controlled in part by the Louisiana Legislature, regardless of federal statutes to the contrary.

The opinion of the Louisiana court is incorrect and, if not reversed, will cause great injustice to federal institutions situated in the state of Louisiana. The grant of authority from Congress in 12 U.S.C. 92 is absolute and intended by Congress to be exercised at the discretion of the Comptroller of the Currency. Under traditional preemption rules, Section 92 overrides conflicting state statutes. This Honorable Court should, likewise, address the relationship of 15 U.S.C. 1012(b) with 12 U.S.C. 92, for without final resolution of this issue, national banks - "institutions of the federal government"- operate at the discretion and control of the Louisiana Legislature.

IV

THIS CASE IS THE MOST APPROPRIATE VEHICLE FOR RESOLUTION OF THE LEGAL ISSUES

The conflict between the Louisiana courts and the United States Court of Appeals, Sixth Circuit is clear as is the need for this Honorable Court to interpret 12 U.S.C. 92 alone

and within the context of 15 U.S.C. 1012(b). Currently, this Court has received the petition from the Eleventh Circuit, and a petition can be anticipated from the Sixth Circuit.

For the following reasons, this petition presents the case most ripe for consideration. First Advantage held a valid agent's license - a property right - issued by the State of Louisiana. The license was issued following approval given to First National and First Advantage by the OCC, and First Advantage's license has been stripped by the Louisiana courts.

By contrast, the Eleventh Circuit only adjudicated a plea to enjoin an order by the Florida Insurance Commissioner to Barnett Bank to cease insurance agency activities. The national banks in Owensboro had not even been granted licenses to sell insurance prior to the instigation of their case.

In addition to erroneously expanding the application of 15 U.S.C. 1012(b) to include state banking statutes and misinterpreting the relationship between 15 U.S.C. 1012(b) and 12 U.S.C. 92, the Louisiana court interprets 12 U.S.C. 92 as permissive. The combination of all three inaccurate interpretations of federal law is unique to the Louisiana decision. Resolution of the issues in the Louisiana case will address the issues in question in Barnett Bank and in Owensboro, should review be requested. Furthermore, this is the only opportunity petitioners have to adjudicate their federal law claims before a federal tribunal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A. Shelby Easterly, III
(Counsel of Record)
Elizabeth C. Dougherty
Easterly & Pittman
142 Del Norte Avenue
Denham Springs, LA 70725
(504) 664-0001

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Attorneys for Petitioner

The authors gratefully acknowledge the contributions of John Stone Campbell, III, Louisiana State University Law Center.

APPENDIX

APPENDIX A
652 So.2d 562

FIRST ADVANTAGE INSURANCE, INC. and
First National Bank of Denham Springs
v.
The Honorable Douglas D. GREEN,
Commissioner of Insurance,
State of Louisiana.

No. 94 CA 0813.

Court of Appeal of Louisiana,
First Circuit.

March 3, 1995.

A.S. Easterly, III, Denham Springs, for appellants First Advantage Ins., Inc. and First Nat. Bank of Denham Springs.

W. Shelby McKenzie, Baton Rouge, for intervenors-appellees, LA Ass'n of Life Underwriters, Professional Ins. Agents of LA, and Independent Ins. Agents of LA.

Julie A. Fusilier, Baton Rouge, for defendant-appellee, Com'r of Ins.

Mary E. Arceneaux, Baton Rouge, for amicus curiae party, LA Bankers Ass'n.

John J. Gill, Washington, DC, for amicus curiae party, Am. Bankers Ass'n.

Before LOTTINGER, C.J., and SHORTESS and CARTER, JJ.

CARTER, Judge.

This is an appeal from a trial court judgment on a petition for review, affirming an administrative ruling revoking the license of First Advantage Insurance, Inc. (First Advantage) to act as a general insurance agent.

BACKGROUND

The following facts were stipulated to by the parties:

1. First Denham Bancshares, Inc. is a federally regulated bank holding company subject to the authority of the Board of Governors of the Federal Reserve System.

2. First National Bank of Denham Springs is a national banking association holding Charter Number 15344, issued by the Comptroller of the Currency, Treasury Department of the United States.

3. First National Bank of Denham Springs is a wholly-owned subsidiary of First Denham Bancshares, Inc.

4. First Advantage Insurance, Inc. is a wholly-owned, non-banking subsidiary of First National Bank of Denham Springs.

5. By letter dated February 27, 1989, First National Bank of Denham Springs sought the Comptroller's approval to "establish an operating subsidiary, to engage in general de novo insurance activities in communities in which the bank has full service branches and a population of which is less than 5,000 inhabitants."

6. By letter dated March 22, 1989, the Office of the Comptroller of the Currency ("OCC") approved the establishment of First Advantage Insurance, Inc. by First National Bank of Denham Springs. The OCC letter stated, inter alia, that First Advantage Insurance, Inc. could "sell insurance as agent to existing and potential customers regardless of where the customers are located."

7. First Advantage Insurance, Inc. is a Louisiana corporation in good standing.

8. First Advantage Insurance, Inc. holds license number 181589 from the Commissioner of Insurance, State of Louisiana.

9. First National Bank of Denham Springs has its principal offices in the City of Denham Springs and has branches in the City of Denham Springs, Springfield, Walker, French Settlement, Albany, and Watson, Louisiana. Only the City of Denham Springs has a population in excess of 5,000 inhabitants.

10. First Advantage Insurance, Inc. is not presently marketing or selling insurance as agent due to the pendency of this administrative proceeding.

11. First National Bank of Denham Springs through First Advantage Insurance, Inc. plans to pursue all insurance agent powers that they believe to be lawful.

12. Robert Alton Seals, Jr. has been a licensed insurance agent for approximately thirteen (13) years and is Vice President and Manager of First Advantage Insurance, Inc. During all of the time that Mr. Seals has been affiliated with First Advantage, he has also been Assistant Vice President and Trust Officer of the First National Bank of Denham Springs.

13. The Louisiana Association of Life Underwriters is a non-profit association representing life insurance agents and is a member of the National Association of Life Underwriters. The Independent Insurance Agents of Louisiana, Inc., is a member of the Independent Insurance Agents of America, Inc. and is a non-profit association representing insurance agents who primarily sell property and casualty insurance, but whose members also sell life insurance and annuities. The Professional Insurance Agents of Louisiana, Inc. is an affiliate of National Association of Professional Insurance Agents, Inc. and is a non-profit association representing insurance agents who primarily sell property and casualty insurance, but whose members also sell life insurance and annuities.

14. By letter dated May 24, 1988, First Denham Bancshares, Inc. sought approval of the Board of Governors of the Federal Reserve System to engage in general insurance agency activities in two Louisiana towns, each with a population of fewer than 5,000 residents, according to the 1980 census.

15. By letter dated November 21, 1988, the Independent Insurance Agents of America, Inc. et al, notified the Board of Governors of the Federal Reserve System of no objection to the application of First Denham Bancshares, Inc. subject to the small town exemption provided by law, 12 USC Section 1843(c)(8)(C)(i) and so long as the geographic limitations that the Board has applied pursuant to that provision were complied with by the applicant.

16. William D. Waldrep, Sara G. Daniel, Michael Atkinson, James F. Patrick and Roy Morgan, all employees of First National Bank of Denham Springs, are licensed by the Commissioner of Insurance, State of Louisiana, to act as life, health and accident insurance agents, in addition to Robert A. Seals, Jr.

17. First National Bank of Denham Springs is only engaged and will only be engaged in the sale of credit related insurance as described in La.R.S. 6:242 A.(6).

18. First Advantage plans to open its office in Walker, Louisiana, and sell insurance from this office. First Advantage may open offices later in Watson, Springfield, French Settlement and/or Albany and sell insurance therefrom.

19. First Advantage may market its insurance products through the following methods: (1) direct mail, with or without geographic limitation, to potential customers, including present customers of First National Bank of Denham Springs; (2) radio advertising through stations whose coverage area is shown on Exhibits 9, 10 and 11, as well as other stations whose coverage area includes Livingston Parish; (3) cable television

systems that transmit to and within Livingston Parish or parts thereof, including Denham Springs; and (4) newspaper advertising through the Denham Springs News, which is published in Denham Springs, Louisiana. The inclusion of these possible marketing methods herein is not intended nor shall it be construed to be an agreement that such is either legally permissible or believed to be legally permissible.

20. The positions of the Comptroller of the Currency and the Office of Financial Institutions are contained within Exhibits 12 and 13 without any agreement between the parties as to the correctness thereof.

21. The present officers of First Advantage are: Robert E. Easterly, President; Ruben Spillman, Sr., Secretary; Oscar P. Waldrep, Jr., Treasurer; and Robert Seals, Jr., Senior Vice President and Manager. R. Dawes Easterly, Ruben Spillman, Sr. and Oscar P. Waldrep, Jr. are the directors of First Advantage. The directors of First Advantage and Robert E. Easterly are also directors of First National Bank of Denham Springs and First Denham Bancshares, Inc., both of which corporations have the same nine (9) directors. R. Dawes Easterly is Chairman and Chief Executive Officer of First Denham Bancshares, Inc., and Robert E. Easterly is President of First Denham Bancshares, Inc. and President and Chief Executive Officer of First National Bank of Denham Springs.

22. First Advantage was the agent of record for the group life insurance policy on employees of First National Bank of Denham Springs from June 1, 1990 through August 1, 1990. First Advantage was the agent of record for the group health and accident insurance policy of First National Bank of Denham

Springs from July 1, 1990 through August 31, 1990. Due to the pendency of this proceeding, First National Bank of Denham Springs changed it agent of record for each policy of insurance described herein effective September 1, 1990. The parties make no contention that First Advantage is ineligible to act as an insurance agent due to non-activity pending resolution of this matter nor that First Advantage was created solely to write insurance coverage for which its employees are beneficiaries.

FACTS

On or about August 2, 1990, First National Bank of Denham Springs (First National) and First Advantage received notice of a hearing from the Commissioner of Insurance (Commissioner). In the notice, the Commissioner ordered First National and First Advantage to show cause why the insurance agent license of First Advantage should not be revoked. The Commissioner alleged that First Advantage was violating LSA-R.S. 22:1214(12)[1] and 22:1121[2] and specifically the Louisiana Insurance Unfair Trade Practices Act by acting as an agent in violation of the state banking laws, in particular LSA-R.S. 6:121B(2), 6:242A(6), and 6:513.

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[1] LSA-R.S. 22:1214(12) declares that any violation of any prohibitory law of this state is an unfair method of competition and unfair or deceptive act or practice in the business of insurance.

[2] LSA-R.S. 22:1121 relates to the refusal, suspension, or revocation of licenses and to the imposition of fines. By Acts 1993, No. 952, s 2, effective, January 1, 1994, LSA-R.S. 22:1121 was repealed, and the provisions relating to the refusal, suspension, or revocation of licenses and to the imposition of fines are now set forth in LSA-R.S. 22:1114 and 22:1115.

After a hearing, the hearing officer incorporated the joint stipulation of facts into his ruling and determined that, although the National Bank Act and the Bank Holding Company Act permit national banks and subsidiaries of national banks to sell insurance in towns with a population of less than 5,000 inhabitants, such authority is subject to state regulation. Because state law, specifically LSA-R.S. 6:121B, prohibits any bank,[3] bank holding company, or subsidiary to engage in any insurance activity except as specifically provided in LSA-R.S. 6:242A(6), the only insurance activity in which a bank may engage is the sale of credit life and credit health and accident insurance to its customers. Accordingly, the hearing officer determined that the insurance agent license of First Advantage was limited in accordance with the provisions of the ruling, either by amendment or the issuance of a new license, and First Advantage's license to act as a full life agent was revoked.

On January 16, 1991, First Advantage and First National filed a petition for judicial review, seeking a reversal of the Commissioner's order and a reinstatement of First Advantage's license. On November 3, 1993, the Louisiana Association of Life Underwriters (LALU), the Professional Insurance Agents of Louisiana (PIAL), and the Independent Insurance Agents of Louisiana (IIAL) filed a petition of intervention. The Louisiana Bankers Association filed an amicus curiae brief in support of the request for review of the administrative determination revoking First Advantage's general insurance agent license to sell life, health, and accident insurance.

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[3] LSA-R.S. 6:2(1) defines a "bank" as "any state bank or any national bank."

After a hearing, the trial court rendered judgment, affirming the decision of the hearing officer and dismissing First National's and First Advantage's petition for review at their costs. The judgment was signed on December 21, 1993.

From this adverse judgment, First Advantage and First National appeal, assigning the following errors:[4]

1. The trial court committed clear error in its decision, reflecting a total misunderstanding of appellants' argument and thus the decision below is entitled to no weight on review.

2. The trial court applied an erroneous test for preemption and erred as a matter of law.

3. The court erred in holding First Advantage's insurance powers are prohibited as an indirect subsidiary of a bank holding company.

4. The lower court denied equal protection of the law to plaintiffs-appellants.

PREEMPTION

The preemption doctrine has its roots in the Supremacy Clause, U.S. Const. Art. VI, cl. 2. It is well settled that the Supremacy Clause of the United States Constitution (Article VI, clause 2) invalidates state laws that "interfere with, or are contrary to" federal law. See Hillsborough County, Florida v.

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[4] Although the opinion does not address each assignment of error individually, the opinion adequately disposes of all of the issues raised.

Automated Medical Laboratories, Inc., 471 U.S. 707, 712, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985); Maryland v. Louisiana, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981). Basic to this constitutional command is the notion that all state provisions which conflict with federal law are without effect. See Maryland v. Louisiana, 451 U.S. at 747, 101 S.Ct. at 2129, 68 L.Ed.2d 576.

Preemption may be either express or implied and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982); Jones v. Rath Packing Company, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); Massachusetts Medical Society v. Dukakis, 815 F.2d 790, 791 (1st Cir.1987), cert. denied, 484 U.S. 896, 108 S.Ct. 229, 98 L.Ed.2d 188 (1987). Consideration under the Supremacy Clause begins with the basic assumption that Congress did not intend to displace state law. But, as the Supreme Court pointed out in Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947):

> Such a purpose [to displace state law] may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the

> object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. (citations omitted).

Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. at 713, 105 S.Ct. at 2375, 85 L.Ed.2d 714. A state statute is also void to the extent it conflicts with federal law--if, for example, "compliance with both federal and state regulations is a physical impossibility," Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. at 713, 105 S.Ct. at 2375, 85 L.Ed.2d 714; Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963), or where the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. at 713, 105 S.Ct. at 2375, 85 L.Ed.2d 714; Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See Maryland v. Louisiana, 451 U.S. at 747, 101 S.Ct. at 2129, 68 L.Ed.2d 576.

In the instant case, the Louisiana statutes and federal statute at issue are LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 and 12 U.S.C. s 92, respectively.

LSA-R.S. 6:121B(2)[5] provides as follows:

> Notwithstanding any other provision of this Title, the commissioner shall not authorize any bank, bank holding company, or subsidiary thereof to engage in any insurance activity except an insurance activity in which a bank may engage pursuant to the provisions of R.S. 6:242(A)(6). However, any bank which was engaged as a general insurance agent or broker on January 1, 1984, may continue to be so engaged.

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[5] Acts 1990, No. 611, s 1, effective July 19, 1990, amended and reenacted LSA-R.S. 6:121B(2), 6:242A(6), and 6:513(3), relative to insurance activities by banks, bank holding companies, or subsidiaries thereof to limit such activity in the event a bank, bank holding company, or subsidiary thereof acquired another bank, bank holding company, or subsidiary thereof, which is authorized to engage in insurance activities. LSA-R.S. 6:121B(2) was amended to provide as follows: Notwithstanding any other provision of this Title, the commissionor shall not authorize any bank, bank holding company, or subsidiary thereof to engage in any insurance activity except an insurance activity in which a bank may engage pursuant to the provisions of R.S. 6:242(A)(6). However, any bank which was engaged as a general insurance agent or broker on January 1, 1984, may continue to be so engaged. If such bank is acquired after January 1, 1984, by another bank, bank holding company, or subsidiary thereof, the insurance agency activities of the surviving bank, bank holding company, or subsidiary thereof shall be limited to insurance activities for persons who are domiciled in or who own property in the parish where the acquired bank maintained its principal office. However, the surviving bank, bank holding company, or subsidiary thereof may continue to engage in insurance activities for any person who was insured by such bank on July 19, 1990.

LSA-R.S. 6:242A(6)[6] provides as follows:

A. In addition to the general corporate powers conferred in R.S. 6:241 and the powers conferred by other provisions of the laws of this state, a state bank shall have the following banking powers and those incidental to the exercise of these powers:

(6) To act as the agent for any insurance company authorized to do insurance business in

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[6] Acts 1990, No. 611, s 1, effective July 19, 1990, amended and reenacted LSA-R.S. 6:121B(2), 6:242A(6), and 6:513(3), relative to insurance activities by banks, bank holding companies, or subsidiaries thereof to limit such activity in the event a bank, bank holding company, or subsidiary thereof acquired another bank, bank holding company, or subsidiary thereof, which is authorized to engage in insurance activities. LSA-R.S. 6:242A(6) was amended to provide as follows: (6)(a) To act as the agent for any insurance company authorized to do insurance business in this state by soliciting and selling insurance, but only with respect to credit insurance which, within the terms and conditions authorized by law, is limited to assuring repayment or partial repayment of the outstanding balance due on a specific extension of credit by a bank in the event of the death, disability, or involuntary unemployment of the debtor and collecting premiums on those policies issued through the bank by such insurance company; and to receive for services so rendered such commissions or fees as may be agreed upon between the bank and the insurance company for which it is acting as agent. Notwithstanding any other provisions of this Title, no bank shall engage or be authorized to engage in any insurance activity that is not expressly permitted by this Paragraph. (b)Nothing contained in this Title shall prohibit any bank which was engaged as a general insurance agent or broker on January 1, 1984, from continuing to be so engaged. If such bank is acquired after January 1, 1984, by another bank, bank holding company, or subsidiary thereof, the insurance agency activities of the surviving bank, bank holding company, or subsidiary thereof shall be limited to insurance activities for persons who are domiciled in or who own property in the parish where the acquired bank maintained its principal office. However, the surviving bank, bank holding company, or subsidiary thereof may continue to engage in insurance activities for any person who was insured by such bank on July 19, 1990.

this state by soliciting and selling insurance, but only with respect to credit insurance which, within the terms and conditions authorized by law, is limited to assuring repayment or partial repayment of the outstanding balance due on a specific extension of credit by a bank in the event of the death, disability, or involuntary unemployment of the debtor and collecting premiums on those policies issued through the bank by such insurance company; and to receive for services so rendered such commissions or fees as may be agreed upon between the bank and the insurance company for which it is acting as agent. Notwithstanding any other provisions of this Title, no bank shall engage or be authorized to engage in any insurance activity that is not expressly permitted by this Subsection (A)(6). Nothing contained in this Subsection or in any other Section or Subsection of this Title shall prohibit any bank which was engaged as a general insurance agent or broker on January 1, 1984, from continuing to be so engaged.

LSA-R.S. 6:513[7] provides that it is unlawful:

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[7] Acts 1990, No. 611, s 1, effective July 19, 1990, amended and reenacted LSA-R.S. 6:121B(2), 6:242A(6), and 6:513(3), relative to insurance activities by banks, bank holding companies, or subsidiaries thereof to limit such activity in the event a bank, bank holding company, or subsidiary thereof acquired another bank, bank holding company, or subsidiary thereof, which is authorized to engage in insurance activities. LSA-R.S. 6:513 was amended to provide as follows: It shall be unlawful: (1) Until July 1, 1989, for any bank

(1) Until July 1, 1989, for any bank holding company or subsidiary thereof to open for business any bank not now opened for business whether or not a charter, permit, license, or certificate to open for business has already been issued.

(2) For any company to become a bank holding company unless the primary purpose of the corporation is the ownership or control of one or more banks.

(3) For any bank holding company or subsidiary thereof to engage in any such insurance activity except an insurance activity in which a bank may engage.

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holding company or subsidiary thereof to open for business any bank not now opened for business whether or not a charter, permit, license, or certificate to open for business has already been issued. (2) For any company to become a bank holding company unless the primary purpose of the corporation is the ownership or control of one or more banks. (3) For any bank holding company or subsidiary thereof to engage in any insurance activity except an insurance activity in which a bank may engage, provided that if a bank holding company or subsidiary thereof acquires a bank that was engaged as a general insurance agent or broker on January 1, 1984, the insurance activities of the surviving bank, bank holding company, or subsidiary thereof shall be limited to insurance activities for persons who are domiciled in or who own property in the parish where the acquired bank maintained its principal office. However, the surviving bank, bank holding company, or subsidiary thereof may continue to engage in insurance activities for any person who was insured by such bank on July 19, 1990.

12 U.S.C. s 92[8] provides as follows:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for

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[8] As noted in the Historical and Statutory Notes to 12 U.S.C. s 92, this section is based on the ninth paragraph of section 13 of Act December 23, 1913, as amended in 1916. The remaining paragraphs of section 13 are classified to sections 342 to 347, 347c, 347d, 361, 372, and 373 of this title. The notes further provide: Faulty placement of quotation marks in the provisions of Act Sept. 7, 1916, c. 461, 39 Stat. 753, which enacted this section, erroneously indicated that this section was enacted as an addition to R.S. s 5202 and not as an addition to section 13 of the Federal Reserve Act (Act Dec. 23, 1913, c. 6, s 13, 38 Stat. 263). Thus, when Congress amended R.S. s 5202 in 1918 (Act Apr. 5, 1918, c. 45, s 20, 40 Stat. 512) and omitted any mention of the provisions of this section, it appeared that the Congressional intent was to omit this section. However, see United States National Bank of Oregon v. Independent Insurance Agents of America, June 7, 1993, U.S. Supreme Court, No. 92-484 [--- U.S. ----, 113 S.Ct. 2173, 124 L.Ed.2d 402], holding that the faulty placement of quotation marks was a simple scrivener's error and that this section had not been repealed by the 1918 enactment.

> services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: Provided, however, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: And provided further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

A cursory reading of these statutes reveals that 12 U.S.C. s 92 permits national banks located in places where the population does not exceed five thousand inhabitants to "act as agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State." However, the provisions of Title 6 under Louisiana law, specifically LSA-R.S. 6:121B(2), 6:242A(6), and 6:513, limit the ability of banks and bank holding companies to engage in any insurance activity, except those activities involving credit life and credit health and accident insurance.

Therefore, because Section 92 authorizes national banks to sell all types of insurance in towns of less than 5,000 inhabitants and the laws of the State of Louisiana limit the ability of all banks, including national banks, to engage in any insurance activity, except credit-related insurance, we conclude that, under a conventional preemption analysis, 12 U.S.C. s 92 may preempt LSA- R.S. 6:121B(2), 6:242A(6), and 6:513. However, our inquiry does not end here.

A. McCarran-Ferguson

We must next determine whether the McCarran-Ferguson Act "immunizes" or "saves" LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 from preemption by 12 U.S.C. s 92. The relevant portion of the McCarran-Ferguson Act states that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, ... unless such Act specifically relates to the business of insurance.

15 U.S.C. s 1012(b).

The McCarran-Ferguson Act was passed by Congress in 1945 in response to the United States Supreme Court's decision in United States v. South-Eastern Underwriters Association, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Prior to that decision, pursuant to Paul v. Commonwealth of Virginia, 75 U.S. 168, 183, 19 L.Ed. 357, 8 Wall. 168 (1868), issuing a policy of insurance was not a transaction of commerce, and, as such, was not subject to federal regulation. In United States v. South-Eastern Underwriters Association, 322 U.S. at 539, 64 S.Ct. at 1166, 88 L.Ed. 1440, the United States Supreme Court noted that the "modern insurance business holds a commanding position in the trade and commerce of our Nation," and held for the first time that insurance activities conducted across state lines were subject to regulatory power of Congress under the Commerce Clause and the antitrust laws, in particular. By subsequently

enacting the McCarran-Ferguson Act, Congress attempted to turn back the clock to assure that the activities of insurance companies in dealing with their policy holders would remain under state regulation. In other words, McCarran-Ferguson "restore[d] the supremacy of the States in the realm of insurance regulation." United States Department of Treasury v. Fabe, --- U.S. ----, ----, 113 S.Ct. 2202, 2207, 124 L.Ed.2d 449 (1993).

The McCarran-Ferguson Act protects Louisiana state law[9] from preemption by federal law[10] if two factors are satisfied. First, the state statutes, LSA-R.S. 6:121B(2), 6:242A(6), and 6:513, must have been enacted "for the purpose of regulating the business of insurance." 15 U.S.C. s 1012(b). Second, the federal statute, 12 U.S.C. s 92, must not "specifically relate to the business of insurance." 15 U.S.C. s 1012(b).

B. Fabe and the Application of 15 U.S.C. s 1012(b).

The analysis for determining whether LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 were enacted for the purpose of regulating the business of insurance is controlled by United States Department of Treasury v. Fabe, --- U.S. at ----, 113 S.Ct. at 2207, 124 L.Ed.2d 449. In Fabe, the United States Supreme Court held that an Ohio statute was saved from federal preemption to the extent that it regulated the relationship

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[9] The applicable state laws in this case are LSA-R.S. 6:121B(2), 6:242A(6), and 6:513.

[10] In this case, the federal law which seeks to preempt the Louisiana state law in this case is 12 U.S.C. s 92.

between the insurance company and its policy holders. United States Department of Treasury v. Fabe, --- U.S. at ----, 113 S.Ct. at 2208, 124 L.Ed.2d 449. In its analysis, the United States Supreme Court distinguished the first and second clauses of 15 U.S.C. s 1012(b). The first clause, "enacted by any state for the Purpose of regulating the business of insurance," deals with those state laws enacted for the purpose of regulating insurance and saves applicable state laws from federal preemption. The second clause, on the other hand, exempts from preemption only "the business of insurance" itself from the antitrust laws. United States Department of Treasury v. Fabe, --- U.S. at ----, 113 S.Ct. at 2209, 124 L.Ed.2d 449. Citing Black's Law Dictionary 1236, 1238 (6th ed. 1990), the United States Supreme Court noted that the broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention, or aim" of adjusting, managing, or controlling the business of insurance. United States Department of Treasury v. Fabe, --- U.S. at ----, 113 S.Ct. at 2210, 124 L.Ed.2d 449. The United States Supreme Court then explained that this category necessarily encompassed more than just "the business of insurance." Thus, the Supreme Court explicitly distinguished the first clause of 15 U.S.C. s 1012(b) from the second clause, making it clear that the first clause "is not so narrowly circumscribed" as the second clause. United States Department of Treasury v. Fabe, --- U.S. at ---- - ----, 113 S.Ct. at 2209-10, 124 L.Ed.2d 449.

Moreover, in Fabe, the United States Supreme Court disputed the allegation that it was violating a basic rule of statutory construction "that identical words used in different parts of the same act are intended to have the same meaning,"

namely that the term "business of insurance" as used in the first and second clauses of 15 U.S.C. s 1012(b) should be ascribed the same meaning. United States Department of Treasury v. Fabe, --- U.S. at ---- n. 6, 113 S.Ct. at 2210 n. 6, 124 L.Ed.2d 449. The United States Supreme Court acknowledged that "[t]his argument might be plausible if the two clauses actually employed identical language," but the first clause of 15 U.S.C. s 1012(b) uses the term "purpose," which is significantly absent from the second clause. United States Department of Treasury v. Fabe, --- U.S. at ---- n. 6, 113 S.Ct. at 2210 n. 6, 124 L.Ed.2d 449. However, the failure to distinguish the first clause from the second overlooks another maxim of statutory construction, namely "that a court should 'give effect, if possible, to every clause and word of a statute.' " U.S. Department of Treasury v. Fabe, --- U.S. at ---- n. 6, 113 S.Ct. at 2210 n. 6, 124 L.Ed.2d 449.

Therefore, in applying the analysis as set forth in Fabe, we must examine the specific provisions of the Louisiana state statutes, namely LSA- R.S. 6:121B(2), 6:242A(6), and 6:513, to determine whether those state statutes were enacted for the purpose of regulating the business of insurance.

1. Were LSA-R.S. 6:121B(2), 6:242A(6), and 6:513, enacted for the purpose of regulating the business of insurance?

In Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453, 460, 89 S.Ct. 564, 568-69, 21 L.Ed.2d 668 (1969), the United States Supreme Court noted that the first clause of Section 2(b) of McCarran-Ferguson, i.e. "for the purpose of regulating the business of insurance," was aimed at:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement--these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the "business of insurance."

393 U.S. at 460, 89 S.Ct. at 568-69, 21 L.Ed.2d 668.

In the instant case, LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 seek to limit or restrict a bank or bank holding company from engaging in any insurance activity not specifically authorized by state statute. The only authorized insurance activity in which a bank, and therefore a bank holding company, may engage is the sale of credit-related insurance. These state statutory provisions were enacted by the state legislature to protect and regulate the relationship between insurer and insured at a very basic level by barring a certain industry, namely the banking industry, from selling all types of insurance. The legislature was apparently concerned that, if banks were licensed to sell all types of insurance, including fire, life, automobile, homeowners, etc., then consumers may feel coerced into purchasing insurance from the bank in order to

obtain a loan regardless of the cost of the premium for such insurance. However, the state legislature permitted the banking industry to sell those credit-related insurances which assure repayment of the banks' outstanding loans to its customers. The state statutory provisions limiting the authority of banks to engage in general insurance sales were enacted out of concern for future policy holders and a desire by the legislature to protect the insurance relationship between insurers and insureds.

Clearly, the relationship between insurer and insured, the authority of an individual or entity to sell a certain type of insurance policy, and other activities of individuals or entities acting in the capacity of insurance companies relate so closely to their status as reliable insurers that they must be placed in the same class as the types of activities that are at the core of the "business of insurance." Regardless of the scope of the statutory provisions and their placement in the Banking Code, it is clear that the focus of the Louisiana state statutes, namely LSA-R.S. 6:121B(2), 6:242A(6), and 6:513, was on the relationship between the insurance company and the policy holder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the business of insurance.

Moreover, although LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 are not located in the state Insurance Code and are located in the state Banking Code, the placement of a statute is not a controlling determinant as to its purpose. As the United States Supreme Court noted in United States Department of Treasury v. Fabe, --- U.S. at ----, 113 S.Ct. at 2210, 124 L.Ed.2d 449, quoting Securities and Exchange Commission v. National Securities, Inc., 393 U.S. at 460, 89 S.Ct. at 569,

"mere matters of form need not detain us." It is sufficient that the state legislature undertook to regulate insurance generally for specific statutes to fall within the meaning of McCarran-Ferguson. The McCarran-Ferguson Act's "state regulation" requirement is satisfied by the general undertaking by a state to regulate the insurance industry. See Federal Trade Commission v. National Casualty Company, 357 U.S. 560, 564, 78 S.Ct. 1260, 1262, 2 L.Ed.2d 1540 (1958).

Based on the above, we find that LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 were clearly enacted to regulate the business of insurance. We must next determine whether the federal statute, 12 U.S.C. s 92, specifically relates to the business of insurance.

2. Does the federal statute, 12 U.S.C. s 92, "specifically relate to the business of insurance."

The legislative history of Section 92 reveals that the provision was enacted to strengthen small national banks by providing them with an additional source of revenue. Owensboro National Bank v. Moore, 803 F.Supp. 24, 34-35 (E.D.Ky.1992). However, the granting of power to national banks which involves insurance does not transform this section into a regulation of the business of insurance. Owensboro National Bank v. Moore, 803 F.Supp. at 36. Moreover, although the United States Supreme Court has not been explicit on how specific a federal statute must be to preempt a state law which regulates the business of insurance, in United States Department of Treasury v. Fabe, --- U.S. at ----, 113 S.Ct. at 2211, 124 L.Ed.2d 449, the United States Supreme Court determined that McCarran-Ferguson calls for a "clear-statement

rule." According to this rule, a federal statute, such as 12 U.S.C. s 92, must "clearly state" that it regulates the business of insurance or otherwise intends to preempt a contrary state law. United States Department of Treasury v. Fabe, --- U.S. at ----, 113 S.Ct. at 2211, 124 L.Ed.2d 449. This scheme creates a reverse-preemption doctrine for insurance regulation in that a state statute that regulates insurance presumptively preempts a contrary Congressional statute unless the Congressional statute specifically relates to the business of insurance. Barnett Bank of Marion County, N.A. v. Gallagher, 43 F.3d 631 (11th Cir. (Fla.)), decided 1/30/95.

Examining the language of 12 U.S.C. s 92, we find that there is nothing in the language to indicate that it regulates the business of insurance. Section 92 is silent as to its effect on state insurance law. There is no language contained therein which expresses congressional intent that it preempts state insurance laws to the contrary. Congress did not expressly state that it intended to preempt the states' traditional power to prohibit insurance activities in their small towns. Instead, Congress merely stated that, in addition to their "shall" powers, national banks "may" act as insurance agents in small towns. The use of the more lenient word "may" in Section 92 supports the notion that Congress did not intend that national banks necessarily be able to sell insurance in small towns. Moreover, Section 92 does not expressly state that it relates to the business of insurance. Other than the provision that national banks may act as insurance agents in small towns, there is no other language in Section 92 dealing with insurance or the regulation thereof. Further, the context of Section 92 has always been within the regulation of banking rather than the regulation of insurance. As such, we find that Section 92 does not

specifically relate to the business of insurance.

In enacting other types of legislation involving insurance and/or the regulation thereof, Congress has been quite explicit, although not always clear, on its intent to preempt contrary state law. In ERISA, for example, Congress clearly set forth its preemptive intent and therefore the preemptive effect of the federal statute. ERISA, unlike Section 92, expressly directs that the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employment benefit plan." 29 U.S.C. s 1144(a). In John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank, --- U.S. ----, ----, 114 S.Ct. 517, 526, 126 L.Ed.2d 524 (1993), the United States Supreme Court applied traditional principles to interpret the scope of the ERISA preemption provisions, but only after it was clear, under the McCarran analysis, that Congress intended to preempt state law.

Certainly, in enacting Section 92, if Congress had intended to regulate the business of insurance and preempt state laws, Congress could have included language to that effect. For example, Congress could have stated that national banks may act as insurance agents in small towns without compliance with state insurance laws. However, Congress did not include such a provision. Instead, in enacting Section 92, Congress stated that national banks "may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State." This language manifests Congressional intent that such small town national banks, which chose to act as general insurance agents, do so as authorized by

the state laws in which the banks were located. Clearly, this language manifests a contrary intent by Congress, namely, that national banks must comply with the insurance laws of the state in which they operate.

Under federal law, national banks in Louisiana have the capability to sell insurance from locations in small towns; however, this right is not unfettered. The State of Louisiana can still oversee the sales of insurance through reasonable licensing requirements applicable to all entities acting as agents for the sale of insurance in Louisiana. In Louisiana, state laws regulating insurance prohibit banks, both state and national, to act as agents for the sale of all types of insurance, except credit-related insurance.

Because 12 U.S.C. s 92 does not specifically relate to the business of insurance, state laws, namely LSA-R.S. 6:121B(2), 6:242A(6), and 6:513, enacted for the purpose of regulating the business of insurance do not yield to the federal statute. Further, there is no "clear statement" that 12 U.S.C. s 92 intends to regulate the business of insurance or otherwise intends to preempt state law. Therefore, we find that the McCarran-Ferguson Act saves LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 from preemption by 12 U.S.C. s 92.

C. Conflict in Federal Courts.

At the time the parties filed their initial briefs, two United States district courts had addressed similar federal preemption issues involving state insurance provisions, from which appeals were taken. See Barnett Banks of Marion County, N.A. v. Gallagher, 839 F.Supp. 835 (M.D.Fla.1993),

and Owensboro National Bank v. Moore, 803 F.Supp. at 24. Since the docketing of the instant appeal, two United States Courts of Appeal have rendered decisions on those appeals. The Sixth Circuit Court of Appeal has rendered a decision in Owensboro National Bank v. Stephens, 44 F.3d 388 (6th Cir. (Ky.)), decided 12/29/94, and the Eleventh Circuit Court of Appeal has rendered a decision in Barnett Bank of Marion County, N.A. v. Gallagher, 43 F.3d 631 (11th Cir. (Fla.)), decided 1/30/95.

1. Owensboro National Bank v. Stephens.

In Owensboro the U.S. appellate court for the Sixth Circuit, in a split decision, addressed whether a Kentucky state statute, which sought to restrict banks from acting as insurance agents for any insurance other than credit- related insurance, was preempted by Section 92.[11] The court concluded that, under a conventional preemption analysis, the Kentucky state statute was preempted by Section 92, which allows national banks in towns of fewer than 5,000 persons to act as insurance agents.

In determining whether McCarran-Ferguson immunizes the Kentucky state statute from preemption by Section 92, the court in Owensboro considered whether the Kentucky state statute had been enacted for the purpose of regulating the

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[11] The Kentucky state statute provided as follows:

No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgagee in mortgage property, other than title insurance.

business of insurance. The court noted that the "business of insurance" is made up of "practices" and "activities" that satisfy the criteria set forth in Union Labor Life Insurance Company v. Pireno, 458 U.S. 119, 120, 102 S.Ct. 3002, 3004, 73 L.Ed.2d 647 (1982). Under Pireno, the criteria are:

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

458 U.S. at 120, 102 S.Ct. at 3004, 73 L.Ed.2d 647.

The majority determined that the Kentucky state statute does not possess the requisite aim of regulating activities that meet the Pireno criteria. The court noted that the Kentucky state statute defined the powers of Kentucky bank holding companies by excluding such companies from participating in activities that constitute the business of insurance. The majority reasoned that excluding a person or entity from participation in an activity is different from regulating the manner in which the activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity. The court in Owensboro then concluded that the Kentucky state statute regulated only persons or entities owning more than one-half of the capital stock of a bank and in no way governed the manner in which the activities constituting the "business of insurance"

are conducted. [12] As such, the majority in Owensboro found that McCarran-Ferguson did not save the Kentucky state statute from preemption by Section 92.

In a dissenting opinion in Owensboro, Judge Alice M. Batchelder opined that the Kentucky state statute was shielded from preemption by Section 92 by the McCarran-Ferguson Act. The dissent found that both factors of the McCarran-Ferguson Act were satisfied in that the Kentucky state statute was enacted for the purpose of regulating the business of insurance and that Section 92 does not specifically relate to the business of insurance. In refusing to apply the Pireno factors, the dissent determined that, although the Pireno criteria are relevant in determining the applicability of the antitrust exemption, they are not determinative with respect to the first clause of 15 U.S.C. s 1012(b).[13]

The dissent further determined that the more recent opinion by the United States Supreme Court in United States Department of Treasury v. Fabe, --- U.S. at ----, 113 S.Ct. at 2202, 124 L.Ed.2d 449, was applicable. According to the dissent, the United States Supreme Court in Fabe distinguished

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[12] Since the court in Owensboro concluded that the Kentucky state statute was enacted for the purpose of regulating certain conduct by bank holding companies, not the business of insurance, the court did not determine whether Section 92 specifically related to the business of insurance because, without regard to whether Section 92 relates to the business of insurance, McCarran-Ferguson could not save the Kentucky state statute from preemption.

[13] In support of this position, Judge Batchelder cited Colonial Life and Accident Insurance Company v. American Family Life Assurance Company, 846 F.Supp. 454, 459 (D.S.C.1994).

between the first and second clauses of 15 U.S.C 1012(b). The first clause of Section 1012(b) deals with state laws enacted for the purpose of regulating the business of insurance and saves applicable state laws from preemption. On the other hand, the second clause exempts from preemption only the business of insurance from the antitrust laws.

In applying the McCarran-Ferguson analysis to the Kentucky state statute, the dissent found that the statute was enacted to regulate the business of insurance. In support of this position, the dissent stated that, if a state aims to protect or regulate the insurer/insured relationship, it is regulating the business of insurance, citing Securities and Exchange Commission v. National Securities, Inc., 393 U.S. at 460, 89 S.Ct. at 568, 21 L.Ed.2d 668. Because the Kentucky state statute sought to regulate the relationship between insurer and insured at its most basic level, namely to limit the involvement of banks in insurance-related activities to prevent the coercion of bank customers into purchasing insurance to obtain loans, the dissent set forth that the Kentucky state legislature enacted the statute out of direct concern for future policy holders. As such, the dissent reasoned that the Kentucky state statute was aimed at the protection of the insurance relationship between insurers and policy holders and regulated the business of insurance.

Moreover, the dissent examined whether Section 92 specifically related to the business of insurance, noting that the United States Supreme Court in Fabe determined that McCarran-Ferguson calls for a "clear statement rule," which means that to be specifically related to the business of insurance, Section 92 must clearly state that it regulates the business of insurance or otherwise intends to preempt a contrary state law.

In refusing to find that Section 92 specifically related to the business of insurance, the dissent noted that the context of Section 92 has always been within the regulation of banking rather than insurance and that no party had cited any case in support of the contention that Section 92 specifically related to the business of insurance.

Accordingly, the dissent determined that McCarran-Ferguson prevented federal preemption of the Kentucky state statute.

2. Barnett Bank of Marion County, N.A. v. Gallagher.

More recently, the United States Court of Appeal for the Eleventh Circuit in Barnett Bank of Marion County, N.A. v. Gallagher, 43 F.3d 631 (11th Cir. (Fla.), decided 1/30/95, addressed the issue of whether a Florida state statute, which provided that no insurance agent licensed by the Department of Insurance who is associated with ... a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency, must yield to Section 92. In applying the criteria set forth in Fabe, the U.S. appellate court for the Eleventh Circuit examined whether the Florida state law was aimed at the regulation of an essential part of the business of insurance. The court determined that, because of the possible pressure which could be applied on policy holders facilitating improper insurance decisions, the Florida state statute protects policy holders. As such, the Florida state statute regulates the business of insurance under the terms of McCarran-Ferguson, and the federal law must yield to the extent that the state law furthers the interest of policy holders.

The Eleventh Circuit Court of Appeal further opined that state laws enacted for the purpose of regulating the business of insurance do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise. In determining whether Section 92 requires otherwise, the court noted that the legislative history of Section 92 revealed that, prior to 1944, Congress and the United States Supreme Court understood Paul v. Commonwealth of Virginia, 75 U.S. at 183, 19 L.Ed. 357, 8 Wall. 168, to place insurance outside the Commerce Clause. The court reasoned that, at the time Congress enacted Section 92 and for thirty years thereafter, Congress believed it did not have the power to regulate insurance. As such, Congress could not have intended to regulate the business of insurance when it did not believe that it had the power to do so. Hence, in enacting Section 92, Congress was concerned with banking and not insurance. The court then concluded that, since Section 92 neither relates to the business of insurance nor specifically requires that the apparently conflicting state law be preempted, under McCarran-Ferguson, the Florida state statute was not preempted by federal law.

For the reasons set forth previously, we believe the opinion in Barnett Bank by the Eleventh Circuit Court of Appeal and the dissenting opinion in Owensboro by the Sixth Circuit Court of Appeal are the better reasoned and are more persuasive than the majority opinion in Owensboro.

BANK HOLDING COMPANY AND SUBSIDIARY

Pursuant to the stipulation of the parties, First National is a wholly-owned subsidiary of Bancshares, a bank holding

company, and First Advantage is a wholly-owned subsidiary of First National Bank. LSA-R.S. 6:121B(2) clearly prohibits any bank, bank holding company, or subsidiary thereof to engage in any insurance activity except as expressly authorized in LSA-R.S. 6:242A(6). Moreover, LSA-R.S. 6:513 prohibits a bank holding company or any subsidiary thereof to engage in any insurance activity, except for those activities in which a bank can engage. Because we have determined that First National cannot engage in any insurance activity, except as authorized in LSA- R.S. 6:242A(6), it follows then that First Advantage, its wholly-owned subsidiary, and Bancshares, a bank holding company, cannot engage in any insurance activity except as authorized in LSA-R.S. 6:242A(6). Pursuant to LSA-R.S. 6:242A(6), the only insurance activity in which a bank and, therefore, a bank subsidiary or a bank holding company may engage in is the sale of credit life insurance and credit health and accident insurance to its customers.

DENIAL OF EQUAL PROTECTION

First National and First Advantage contend that the prohibition on bank sales of insurance violates the Equal Protection Clauses of both the federal and state constitutions because savings and loans are permitted to sell insurance in Louisiana. However, First National and First Advantage failed to demonstrate that state and national banks are treated differently. The Louisiana statutory scheme clearly prohibits all banks, both national and state, from engaging in any insurance activity, except for the sale of credit life insurance and credit health and accident insurance to its customers. Moreover, First National and First Advantage failed to demonstrate that the Louisiana statutory scheme with regard to the differential

treatment of banks and savings and loans with respect to the sale of insurance is unconstitutional.

CONCLUSION

The issues raised in this appeal are the most recent conflicts in the long running turf battle on the part of two powerful industries, namely banking and insurance, each of which is subject to governmental regulation. The jurisprudence reveals that these battles are occurring in states around the country, and different courts are arriving at different results. Ultimately, the various questions raised will have to be answered by the United States Supreme Court. We strongly feel that we have reached the better reasoned conclusion to the very complicated issues involved in this litigation.

For the above reasons, the judgment of the trial court affirming the revocation of First Advantage's general insurance agent license and limiting such insurance agent license to the sale of credit life and credit health and accident insurance to its customers is affirmed. To the extent that the judgment of the trial court is in conflict with this opinion, it is hereby amended. First Advantage and First National are cast for all costs on appeal.

AFFIRMED, AS AMENDED.

APPENDIX B

THE SUPREME COURT OF LOUISIANA

FIRST ADVANTAGE INSURANCE,
INC. AND FIRST NATIONAL
BANK OF DENHAM SPRINGS
VS. NO. 95-C-0820
THE HONORABLE DOUGLAS O.
GREEN, COMMISSIONER OF
INSURANCE, STATE OF LOUISIANA

IN RE: First Advantage Ins.; First national Bk.Den.Spgs;- Plaintiff(s); Applyng for Writ of Certiorari and/or Review; Parish of East Baton Rouge 19th Judicial District Court Div. "K" Number 365,353; to the Court of Appeal, First Circuit, Number 94CA 0813

May 5, 1995

Denied.

JPV
WFM
JCW
HTL
CDK

CALOGERO, C.J. not on panel.
DENNIS, J. would grant the writ.
JOHNSON, J. would grant the writ.
Supreme Court of Louisiana, May 5, 1995

/S/
FRANS LABRANCHE
Clerk of Court for the Court

APPENDIX C

FIRST ADVANTAGE INSURANCE, INC., AND FIRST NATIONAL BANK OF DENHAM SPRINGS	NINETEENTH JUDICIAL DISTRICT
VS	STATE OF LOUISIANA
DOUGLAS O. GREEN, AS COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA	DOCKET NO. 365,352 DIVISION "F"

REASONS FOR JUDGMENT

This matter is before the Court by way of appeal from an administrative ruling rendered pursuant to a hearing instituted by the Commissioner of Insurance, State of Louisiana, to revoke the license of First Advantage Insurance, Inc., to act as a general insurance company.

Appellants are First Advantage insurance, Inc., (First Advantage) and First National Bank of Denham Springs (Bank), who contend the Administrative Hearing Officer erred in holding that First Advantage is amenable to state regulation and ordering revocation of its license to act as an insurance agency which does not actually write insurance coverage.

Interventions were filed by the Louisiana Association of Life Underwriters, Professional Insurance Agents of Louisiana and Independent Insurance Agents of Louisiana, in support of

the Commissioner of Insurance.

The matter is before this Court on motion by appellants for summary judgment. All relevant facts are stipulated.

It is stipulated that Bank is a duly chartered and licensed National Bank, having its principal office in Denham Springs, Louisiana. Bank is a wholly owned subsidiary of First Denham Bank Shares, Inc., a Federally regulated Bank Holding Company. First Advantage is a wholly owned non-banking subsidiary of Bank.

On March 22, 1989, the office of the Comptroller of Currency approved creation of First Advantage by Bank, including First Advantage's right to sell insurance as agent to existing or potential customers regardless of where the customers are located.

Appellants maintain that as a Federally chartered bank, it is authorized to engage in the insurance business by virtue of the decision in The United States vs South-Eastern Underwriters Association, 322 U.S. 533, (1944), which held that the Sherman Anti-Trust Act applied to insurance companies. It is argued that since regulation of insurance has thus been reserved exclusively to the Federal Government, the State of Louisiana is without authority to act in the field of insurance and may not revoke First Advantage's license.

Appellants' argument totally disregards congressional enactment of the McCarran-Ferguson Act, 15 USC 1011-1015, in 1945, following rendition of The United States vs South-Eastern Underwriters, (above), in 1944, and subsequent

jurisprudence interpreting the McCarran-Ferguson Act.

In effect McCarran-Ferguson restricted application of Federal Anti-Trust legislation to the insurance business. In subsequent decisions the Supreme Court held that McCarran-Ferguson vested broad powers in the states to control the insurance business. Prudential Insurance Company vs Benjamin, 328 U.S. 408 (1946). In United States Department of Treasury vs Fabe, 113 S. Ct. 2202, (1993), the Court expressly declared that McCarran-Ferguson was designated to restore state supremacy in the realm of insurance.

McCarran-Ferguson Section 1 states:

> That the continued regulation and taxation by the several states of the business of insurance is in the public interest.

Noteworthy are the following provision [sic] of McCarran-Ferguson:

> 15 USC 1012. Regulation by State Law;
>
> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance ... unless

> such act specifically relates to the business of insurance.

In view of the foregoing, it is clear that states may regulate the insurance industry in general.

Appellants next contend that as a subsidiary of a National Bank, First Advantage is entitled to act as an agent in municipalities which do not exceed 5,000 population pursuant to 12 USC 92, which pertinently provides:

> In addition to the powers now vested by law in national banking associations organized under to [sic] laws of the United States any such association located and doing business in any place the population of which does not exceed 5,000 inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as agent for any fire, life, or other insurance company authorized by the state in which such bank is located to do business in said state, by soliciting and selling insurance and collecting premiums on policies issued by company ...(emphasis added by court).

In essence Appellants contend that since the foregoing statute expressly authorizes First Advantage to act as an insurance agent in communities of 5,000 or less, it constitutes a federal reservation of authority in this regard and states have no authority to intervene or decide differently.

It is noteworthy that 12 USC 92, above, is permissive and does not expressly prescribe Federal supremacy in its application. Fabe, above, makes it crystal clear that state laws regulating insurance do not yield to conflicting federal legislation unless the federal statute specifically and expressly so requires. The Court finds no espress [sic] reservation of Federal supremacy in 12 USC 92. It follows that Louisiana statutes prevail in this instance.

Appellants next contend that First Advantage is not subject to the Commissioner's regulation as an insurance company because it does not sell, underwriter issue insurance policies per se, but merely acts as agent for companies that do write insurance.

LA-R.S. 22:2 A states that as a matter of public policy, insurance is a business affected with a public interest and that the purpose of the Insurance Code is to regulate insurance "IN ALL ITS PARTS."

It cannot be logically argued that the solicitation of insurance or acting as agent of an insurer is not a phase of the insurance industry. Consequently, this Court has no difficulty in finding that acting as an agent and soliciting insurance for any purpose whatsoever is subject to regulation by the Commissioner of Insurance.

LA-R.S. 6.513(4) provides as follows:

It shall be unlawful:

(4) for any bank holding company or

> subsidiary thereof to engage in any insurance activity except an insurance activity in which a bank may engage.

LA-R.S. 6.242(6) authorizes banks to:

> (6) act as the agent for an insurance company authorized to do business in this state by soliciting and selling insurance but only with respect to credit insurance, which, within the terms and conditions authorized by law, is limited to assuring repayment or partial repayment of the outstanding balance due on a specific extension of credit by a bank in the event of death, disability, or involuntary unemployment of the debtor ...

Construed together, LA-R.S. 6.513(4) and LA-R.S. 6:242A(6) clearly provide that banks may only sell credit insurance as security for the repayment of an outstanding balance due on a specific extension of credit to a customer in the event of death, disability or involuntary unemployment of the debtor. All other types of insurance activity by banks is prohibited in this state.

Appellants argue that since LA-R.S. 6.513(4) and LA-R.S. 6.242A(6) does not expressly refer to national banks, it can have no applicant [sic] to First Advantage.

The Court notes that LA.R.S. 6.513(4) applies to ANY bank holding company or subsidiary thereof. Any, is all inclusive. Since the state may regulate insurance, it may

regulate a subsidiary of a national bank insofar as it seeks to engage in the insurance business.

Finally, Appellants maintain that authority to regulate does not include authority to revoke a license issued, therefore the Commissioner of Insurance exceeded his lawful authority because such action amounts to prohibition, not regulation.

Prohibition was expressly recognized as a form of regulation by the United States Supreme Court in Hammer vs Dagenhart, 247 U.S. 251, 38 S.C.[sic] 529, 62 LEd. 1101 (1918).

It is ludicrous to argue that regulation does not include power to license, or revoke or suspend the license of an individual or corporation subject to regulation. To hold otherwise would defeat the underlying principal of regulation which, in the field of insurance, involves a business statutorily declared to be affected with a vital public interest. Without authority to revoke the license of an entity violating a business affected with a public interest, the public interest intended to be protected would be greatly compromised.

For the reasons hereinabove assigned, judgment will be rendered herein dismissing Appellants' appeal and affirming the decision of the Administrative Officer, at Appellants' cost.

Baton Rouge, Louisiana, November 19th, 1993

PAUL B LANDRY, JR.
Paul B. Landry, Jr.
Judge Pro Tem

APPENDIX D

COMMISSIONER OF INSURANCE
STATE OF LOUISIANA

VS. DOCKET NO. 354

FIRST NATIONAL BANK
OF DENHAM SPRINGS
AND FIRST ADVANTAGE
INSURANCE, INC.

RULING

This matter comes before the Commissioner of Insurance for the State of Louisiana pursuant to due notice mailed to and received by respondents. This matter concluded on November 7, 1990.

The purpose of this hearing was as indicated in notice. First Advantage Insurance, Incorporated was to show cause why its license to act as a life insurance agent should not be suspended or revoked (or a fine levied in lieu thereof) pursuant to L.R.S. 22:1121(5) and (9) and for violating L.R.S. 22:1214(12). Specifically, this hearing was to determine whether or not or under what limitations First Advantage Insurance, Incorporated may engage as an insurance agent in the State of Louisiana.

Present for the hearing were:

Mr. Jonathan B. Sallet, Esquire, representing the

Independent Insurance Agents of Louisiana, et al, complainants.

Mr. Shelby Easterly, Esquire, representing First National Bank of Denham Springs and First Advantage Insurance, Incorporated; and

John Fontenot, General Counsel for the Commissioner of Insurance, Hearing Officer.

FINDING OF FACT

The parties have entered into Stipulation of Fact which are hereby incorporated as the Findings of Fact of this Ruling.

CONCLUSIONS OF LAW

1. The regulation of insurance, in all its facets, including judging the competence and integrity of agents to sell insurance is a matter for the Commissioner of Insurance. L.R.S. 22:2, 1214(12), 1121(5) and (9) and McCarran-Ferguson Act 15 U.S.C. 1012.

2. The National Bank Act and the Bank Holding Company Act permits National Banks and subsidiaries of Bank Holding Companies to sell insurance in towns with a population of 5,000 or less. 12 U.S.C. 92 and 1843 (8)(C)(I).

3. Such permission, however, is subject to local state restrictions and regulation. 12 U.S.C. 1846 and cases cited on pgs. 4-9 of the Supplemental Memorandum of complaints and Post Hearing Memorandum pages 8-12. (Sallet).

4. Although the Commissioner of Insurance cannot regulate banks or judge the competence of banks to act within activities incidental to banking, he can regulate all insurance activities, including who may sell any what they may sell.

5. There is no federal preemption of state law concerning insurance regulation by the Commissioner of Insurance in the area of Banks (state or national) or Bank Holding Company subsidiaries and the insurance activities they may pursue or of state banking laws limiting such insurance activities. Complainants' Supplemental Memorandum, cases cited on page 4-9 and complainants' Post Hearing Memorandum, cases cited on page 6. (Sallet)

6. L.R.S. 6:2 defines "bank" as an [sic] state or national bank.

7. L.R.S. 6:121B(2) provides that no bank, bank holding company or subsidiary shall engage in any insurance activity except as provided in L.R.S. 6:242(A)(6). See also L.R.S. 6:513, 512A(1) and C.

8. The only insurance activity that a "bank" as defined in Title 6 may engage in is (for the purpose of this hearing) the sale of credit life and credit health and accident insurance to its customers. Further, National Banks are limited to selling this insurance to its customers in towns with a population of 5,000 or less if it operates through an operating subsidiary. First National Bank of Denham Springs itself as an agent could only sell insurance if it were located in a town with a population of 5,000 or less.

9. L.R.S. Title 6 treats all banks (state or national) equally and gives none an advantage over the other, in terms of insurance activities. (Except that National banks and Holding Company subsidiaries) are limited to act as agents for its customers in towns with a population of 5,000 or less.

10. The Commissioner of Insurance has full authority to judge whether or in what circumstances such banks or their subsidiaries may be licensed as agents for the business of insurance.

11. Permission or authority to act does not equal license to so act. Furthermore, in restricting the insurance activities of banks (state and national) the state is not adversely affecting the purpose stated in L.R.S. 6:5 to promote the dual chartering of banks. Keeping all banks on equal footing in fact promotes said purpose.

12. First Advantage Insurance, Incorporated is the operating subsidiary of First National Bank of Denham Springs for it to engage as an agent for the sale of insurance.

13. First Advantage Insurance, Incorporated, as such, is also an indirect subsidiary of First National Bankshares, Incorporated, First National Bank's Holding Company. This is bolstered by the fact that the officers and directors of all three entities are the same. 12 U.S.C. 1841 (g)(1) and case cited by complainants in Post Hearing Memorandum on page 5.

14. As such, First Advantage Insurance, Incorporated is subject to the limitations in L.R.S. Title 6 to engage in insurance activities.

15. First Advantage Insurance, Incorporated may engage in (is only competent, due to said restrictions, to engage in), the sale of credit life, health and accident insurance to customers of First National Bank of Denham Springs located in towns with a population of 5,000 or less.

16. First Advantage Insurance, Incorporated, if it were not owned as a subsidiary to First National Bank of Denham Springs, could not operate competently, in terms of no restrictions, as an agent to sell any type of insurance which it received license for.

17. First Advantage Insurance, Incorporated would be in violation of L.R.S. 22:1214(12) and 1121 (5&9) to sell insurance other than that authorized by Title 6.

CONCLUSIONS

First Advantage Insurance, Incorporated may engage in the sale of credit life, health and accident to customers of First National Bank of Denham Springs in towns with a population of 5,000 or less. The license of First Advantage Insurance, Incorporated is to be so limited, in accordance with the provisions of the ruling, either by amendment or the issuance of a new license.

First Advantage Insurance, Incorporated's present license to act as a full life agent, is hereby revoked.

DONE, at Baton Rouge, Louisiana, this 17th day of December, 1990.

JOHN B. FONTENOT

JOHN B. FONTENOT
GENERAL COUNSEL FOR
COMMISSIONER OF INSURANCE
AND HEARING OFFICER

APPENDIX E
44 F.3D 388

THE OWENSBORO NATIONAL BANK; The First National Bank of Louisa; Citizens National Bank of Paintsville; Kentucky Bankers Association, Plaintiffs-Appellees,

United States of America, Intervening Plaintiff-Appellee,

v.

Don W. STEPHENS, Commissioner, Department of Insurance, Commonwealth of Kentucky, Defendant-Appellant (92-6330),

Kentucky State Association of Life Underwriters; Independent Insurance Agents of Kentucky, Inc.; Kentucky Association of Professional Insurance Agents, Intervening Defendants-Appellants (92-6331).

Nos. 92-6330, 92-6331.

United States Court of Appeals,
Sixth Circuit.

Argued Sept. 29, 1994.

Decided Dec. 29, 1994.

Rehearing and Suggestion for Rehearing En Banc Denied March 15, 1995.

M.T. Senn (argued and briefed), Morgan & Pottinger, Louisville, KY, M. Brooks Senn, Kentucky Bankers Ass'n, Louisville, KY, for plaintiffs-appellees.

Joseph L. Famularo, U.S. Atty., Lexington, KY, Anthony J. Steinmeyer, Jacob M. Lewis (argued and briefed), Dept. of Justice, Appellate Staff, Civil Div., Rosa M. Koppel, Office of Comptroller of Currency, Paul W. Bridenhagen, Anne L. Weismann, Dept. of Justice, Washington, DC, for intervenor-appellee in No. 92- 6330.

Stephen B. Cox (briefed), Kentucky Dept. of Ins., Frankfort, KY, Ann M. Kappler (argued and briefed), Jenner & Block, Washington, DC, for defendant- appellant.

Michael F. Crotty (briefed), American Bankers Ass'n, Washington, DC, for amicus curiae American Bankers Ass'n.

Joseph L. Famularo, U.S. Atty., Lexington, KY, Rosa M. Koppel, Office of Comptroller of Currency, Paul W. Bridenhagen, Anne L. Weismann, Dept. of Justice, Washington, DC, for intervenor-appellee in No. 92-6331.

Jonathan B. Sallet, Ann M. Kappler (argued), Ann M. Kappler, Jenner & Block, Washington, DC, Terrell L. Black, Larry R. Blanton, Black, Carle, Maze & Wilmes, Louisville, KY, for intervenors-appellants.

Before GUY and BATCHELDER, Circuit Judges; and McKEAGUE, District Judge.*

* Honorable David W. McKeague, United States District

Court for the Western District of Michigan, sitting by designation.

RALPH B. GUY, Jr., Circuit Judge.

Defendants, the Commissioner of the Kentucky Department of Insurance ("Commissioner") and various Kentucky insurance industry associations, appeal the district court's grant of summary judgment in favor of plaintiffs, which are national banks doing business in Kentucky towns with populations of fewer than 5,000 persons. The district court concluded that a Kentucky statute that bars bank holding companies from acting as insurance agents was preempted by a federal statute that allows national banks operating in towns of fewer than 5,000 persons to act as insurance agents. On appeal, defendants argue that the Kentucky statute, Ky.Rev.Stat.Ann. s 287.030(4) ("section 287"), does not conflict with the federal statute, 12 U.S.C. s 92, and that, in any event, the McCarran-Ferguson Act, 15 U.S.C. s 1011 et seq., and section 7 of the Bank Holding Companies Act, 12 U.S.C. s 1846, each "immunize" section 287 from preemption by s 92. We reject these arguments and affirm.

I.

In late 1990, plaintiffs submitted to the Commissioner requests for applications for licenses to act as life and general line insurance agents in Kentucky. The Commissioner denied these requests, but scheduled a hearing before a state administrative law judge ("ALJ") on the issue of whether section 287 barred plaintiffs from acting as insurance agents. Before that hearing was held, however, plaintiffs filed this

lawsuit, seeking declaratory and injunctive relief. A Kentucky state court thereafter granted plaintiffs' request for a stay of the administrative proceedings pending the outcome of this lawsuit. Meanwhile, a number of Kentucky insurance industry associations intervened on behalf of the Commissioner in this lawsuit. The United States intervened on behalf of plaintiffs. Defendants filed a motion to dismiss, arguing that the case was not justiciable because of the unfinished administrative proceeding before the ALJ. Plaintiffs then filed a motion for summary judgment, to which defendants responded by filing a cross-motion for summary judgment. In a published opinion, see 803 F.Supp. 24 (E.D.Ky.1992), the district court determined that the case was justiciable,[1] granted plaintiffs' motion for summary judgment, and granted plaintiffs the relief they sought. This appeal followed.

II.

Defendants first argue that section 287 is not preempted by s 92 under conventional preemption analysis. Section 287 provides:

> No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property

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[1] Defendants have not raised any justiciability issues on appeal, and the district court appears to have decided them correctly.

30 years before South-Eastern Underwriters--Congress could not have been attempting to regulate a business that it believed it had no power to regulate. Congress was concerned with banking, not insurance.

This Court concludes that section 92 neither "specifically relates to the business of insurance," 15 U.S.C. s 1012(b), nor "specifically requires," Fabe, --- U.S. at ----, 113 S.Ct. at 2211, that apparently conflicting state laws be preempted. Accordingly, under McCarran-Ferguson, Fla.Stat. ch. 626.988 need not yield to section 92. Based on this determination that Fla.Stat. ch. 626.988 may proscribe national-bank subsidiaries from conducting insurance activities within Florida, we do not reach the issues of whether, if such banks could sell insurance, they could do it nationally.

V. CONCLUSION

We hold that the district court correctly interpreted both the federal and state statutes at issue in this case. Further, we hold that the district court's findings of fact were not clear error. We AFFIRM.

issue in United States Nat'l Bank of Or. v. Indep. Ins. Agents, --- U.S. ---, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). Finding the apparent repeal of section 92 to have been mere scrivener's error in placing *637 section 92 in the Rev.Stat. s 5202 rather than the Federal Reserve Act, as the Court divined Congress had intended, the Supreme Court held section 92 had escaped repeal.[2]

Although Nat'l Bank of Or. did not address whether section 92 relates to insurance, it did emphasize at length the relation between section 92 and both the National Bank Act and the Federal Reserve Act, neither of which suggests section 92 relates specifically to insurance or was a specific attempt to preempt state insurance laws. Both Acts concern banking, not insurance. Moreover, Congress enacted section 92 "at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." Fabe, --- U.S. at ----, 113 S.Ct. at 2212. As the trial court pointed out, "[e]ven South-Eastern Underwriters, which briefly altered the preemption landscape, noted that prior to 1944 Congress 'at no time' had attempted to control the business of insurance." (R3-69-18) (citing 322 U.S. at 544, 64 S.Ct. at 1168-69). Before 1944, both Congress and the Supreme Court understood Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183, 19 L.Ed. 357 (1868), to place insurance outside the Commerce Clause power. Accordingly, when Congress enacted section 92 in 1916--nearly

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[2] All of the above history of section 92 and the National Bank Act is taken in compacted form from Nat'l Bank of Or., --- U.S. ----, 113 S.Ct. 2173 (1993). For a more detailed discussion replete with citations and authorities, see Justice Souter's opinion for a unanimous Court, id. at ---- - ----, 113 S.Ct. at 2179-82.

In 1863, the Civil War Congress enacted the National Bank Act, which it then reenacted in 1864. The Act created federally chartered national banks and empowered them to issue and accept a uniform national currency. One section of the National Bank Act limited the indebtedness of national banks. In 1874, Congress revised, reorganized, and reenacted all statutes in effect at the time, including this indebtedness provision, and simultaneously repealed all prior statutes. With minor stylistic changes, Title 62 of the Revised Statutes s 5202 contained the National Bank Act's indebtedness provision.

In 1913, Congress amended Rev.Stat. s 5202 to include a fifth exception to the indebtedness provision. The amendment was a detail of the Federal Reserve Act of 1913, which created Federal Reserve banks and the Federal Reserve Board, and required national banks to become members of the new Federal Reserve System. Finally, in 1916, Congress enacted what we today call section 92. One portion of section 92 authorized national banks located and doing business in places with fewer than five thousand inhabitants, as shown by the last preceding decennial census, to be agents for any fire, life, or other insurance company authorized to do business in the State where the bank is located.

Two years later, however, Congress repealed all of s 5202 except the indebtedness provision. The story, however, does not end here. In 1982, Congress actually amended section 92. See Garn-St. Germain Depository Institutions Act of 1982, s 403(b), 96 Stat. 1511; see also Competitive Equality Banking Act of 1987, s 201(b)(5), 101 Stat. 583 (imposing a one-year moratorium on section 92 activities). Amid confusion over whether section 92 still lived, the Supreme Court tackled the

profit. While appellant Barnett Marion argues that the statute exists only to protect "independent insurance agents from competition by financial institutions," Appellant's Brief at 35, we disagree. The danger in these situations, as the trial court correctly points out, is the loss of arms-length transactions and objectivity when the bank becomes involved with insurer and insured. "The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders." (R3-69-16).

Relying on the state court interpretations, testimony at trial, reference in the Florida statute to McCarran-Ferguson, and explicit instruction from the United States Supreme Court in Nat'l Securities that regulatory protection of policyholders may be indirect, 393 U.S. at 460, 89 S.Ct. at 568-69, the trial court found that Fla.Stat. ch. 626.988 regulates the business of insurance because it protects policyholders. We agree. "Under the terms of the McCarran-Ferguson Act, 15 U.S.C. s 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interests of policyholders." Fabe, --- U.S. at ----, 113 S.Ct. at 2208.

3. Section 92

"State laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." Fabe,--- U.S. at ----, 113 S.Ct. at 2211. The question now is whether section 92 specifically requires otherwise. To answer this question, we examine the section's history.

> activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the statute and remain valid today ... [A] legislature could well have decided that some protection was required.

Glendale Fed. S & L. Ass'n. v. Fla. Dept. of Ins., 587 So.2d 534, 536 n. 1 and 537 (Fla. 1st Dist.Ct.App.1991) (citations omitted), rev. denied, 599 So.2d 656 (Fla.1992).

> [Moreover,] insurance is an industry affected with a public interest and subject to regulation by the States. The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest.

Prod. Credit Ass'ns. of Fla. v. Fla. Dept. of Ins., 356 So.2d 31, 32 (Fla. 1st Dist.Ct.App.1978).

At trial, the Director of Legal Services for the Florida Department of Insurance, Mr. Shropshire, testified about the need to protect policyholders by regulating the financial stability of insurance companies so that they remain solvent and able to pay claims upon demand, which could be threatened by pressures to make improper insurance decisions. This pressure could force an insurer to assume a bad risk to quickly consummate a bank loan, or could push a bank customer to take out unnecessary insurance where the bank's only motive is

> activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

Id. at 460, 89 S.Ct. at 568-69 (emphasis added).

The question we now ask is whether the Florida statute meets this test because it was enacted to protect policyholders by regulating their relationship with the insurer. In the instant case, the trial court relied on state court interpretations of the Florida statute and testimony from the Director of Legal Services for the Florida Department of Insurance to hold that Fla.Stat. ch. 626.988 was enacted to regulate the relationship between insurers and potential policyholders or, more broadly, "the insurance-purchasing public at large." (R3-69-12). Specifically, the Florida cases relied on express a concern underlying the statute with overreaching by financial institutions if permitted to sell insurance. The Florida First District Court of Appeals has spoken at least twice on the subject, finding that:

> [b]ecause the statute concerns the regulation of insurance, it is a matter within the state's exercise of police power and large discretion is vested in the legislature.... Concerns regarding financial institutions' entry into insurance

entitled "Insurance Field Representatives and Operations," Fla.Stat. ch. 626, and a statutory part entitled "Unfair Insurance Trade Practices," Fla.Stat. ch. 626, part. X, must regulate insurance. The Supreme Court, however, has cautioned that location informs but does not determine whether a statute regulates "the business of insurance." United States Dept. of Treasury v. Fabe, --- U.S. ----, ----, 113 S.Ct. 2202, 2210, 124 L.Ed.2d 449 (1993). More important, held the Court, is whether the statute's aim is to regulate "an essential part of the 'business of insurance.' " Id.

In Fabe, the Supreme Court held that an Ohio statute that accorded policyholders priority over an insolvent insurance company's other creditors was a law enacted to regulate the business of insurance because it regulated policyholders and their relationship to the insurance company. Id. at ----, 113 S.Ct. at 2212. Under McCarran-Ferguson, this portion of the Ohio statute preempted a contrary federal statute giving the United States priority over other creditors of a bankrupt. See id. The Supreme Court in Fabe took this "relationship" test directly from S.E.C. v. Nat'l Sec., Inc., 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969), which involved an Arizona statute designed to protect insurance companies's shareholders. In finding that the Arizona statute was not enacted to regulate the business of insurance, the Court held:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement--these were the core of the "business of insurance" [as used within McCarran-Ferguson.] Undoubtedly, other

> 1945 (Pub.L. No. 15, 79th Congress) [McCarran-Ferguson], by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

To this end, Fla.Stat. ch. 626.988 provides, in relevant part:

> (2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

Fla.Stat. ch. 626.988(2). Subsection (1)(a) defines a "financial institution" to include any bank or bank holding company, or any subsidiary, affiliate, or foundation thereof. "Specifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census." Id. Barnett Marion's status as a national-bank subsidiary removes it from this narrow exception and prohibits it from engaging in insurance activities under the Florida statute.

At first blush, it seems evident that a statutory chapter

In response, Congress passed the McCarran-Ferguson Act, which proclaimed that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 59 Stat. 34 (1945), 15 U.S.C. s 1012(b) (emphasis added). This statutory scheme creates a reverse-preemption doctrine for insurance legislation. That is, a state statute that regulates insurance presumptively preempts a contrary Congressional statute unless the Congressional statute specifically relates to insurance. Congress declared this state regulation to be in "the public interest." 15 U.S.C. s 1011.

With McCarran-Ferguson guiding our analysis, this Court first must ask whether Fla.Stat. ch. 626.988 regulates insurance, so as to presumptively preempt contrary federal law. Second, we must ask whether section 92 specifically relates to insurance, so that it will fit within the McCarran-Ferguson exception that reinstates federal law as supreme.

2. Florida Law

The state statute at issue, Fla.Stat. ch. 626.988, is part of the Unfair Insurance Trade Practices Act (Part X), located within the Florida Insurance Code. Florida Statute chapter 626.951 declares that:

> The purpose of this part [X] is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9,

Television Co. of Fla. v. Thomas J. White Dev. Corp., 902 F.2d 905, 908 (11th Cir.1990); Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225, 1227 (11th Cir.1990). We review the district court's fact findings in a bench trial for clear error. Fed.R.Civ.P. 52(a); Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

IV. ANALYSIS

A. Findings of Fact

While the parties dispute whether the trial court made findings of fact or merely conclusions of law, none of the parties alleges the trial court erred in its fact-finding. Appellant Barnett Marion's Initial Brief at 16; Appellee Gallagher's Initial Brief at 13; Appellee Underwriter's Initial Brief at 12. Accordingly, we review de novo the trial court's conclusions of law.

B. Conclusions of Law

1. McCarran-Ferguson

In the late 19th Century, the United States Supreme Court held insurance contracts were not in interstate commerce. Paul v. Virginia, 75 U.S. (8 Wall) 168, 183, 19 L.Ed. 357 (1868). The states then developed extensive insurance regulations. In 1944, the Supreme Court rejected that analysis in United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), holding Congress could regulate insurance under its Commerce Clause power. Id. at 553, 64 S.Ct. at 1173-74.

> pre-empted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim are pre-empted by ERISA, as well as declarations that those laws are pre-empted.
>
> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See Ex parte Young, 209 U.S. 123, 160-162 [28 S.Ct. 441, 454-55, 52 L.Ed. 714] (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. s 1331 to resolve.

Id. at 96, n. 14, 103 S.Ct. at 2899, n. 14.

In accord with Supreme Court case law, we hold that a federal court has federal question jurisdiction to decide a claim against a state officer or agency alleging that a federal statute preempts a state statute under the Supremacy Clause and that the state statute cannot be enforced. This Court has appellate jurisdiction under 28 U.S.C. s 1291.

III. STANDARD OF REVIEW

This appeal requires review of the district court's statutory interpretation. Such review is de novo. Centel Cable

The district court denied Barnett Marion's motion for TRO and held a hearing on the motion for preliminary injunction. The court denied the motion for the preliminary injunction and set the case for trial.

The issues before this court are as follow: First, whether Fla.Stat. ch. 626.988 regulates insurance. Second, whether 12 U.S.C. s 92 relates to insurance. Third, whether Barnett Marion is located and doing business in a place with fewer than five thousand people, and if so, whether the bank may sell insurance nationally or only within this small town. To answer these questions of law we must examine the history and purposes of these statutes.

II. JURISDICTION

Upon the Court's request at oral argument, each side briefed the issue of whether the district court had subject matter jurisdiction to decide the case. Based on Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 259 n. 6, 105 S.Ct. 695, 697 n. 6, 83 L.Ed.2d 635 (1985) and Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983), we find subject matter jurisdiction. The United States Supreme Court specified in Shaw that:

> The Court's decision today in Franchise Tax Board v. Construction Laborers Vacation Trust, ante, [463 U.S.] p. 1, [103 S.Ct. 2841, 77 L.Ed.2d 420] (1983) does not call into question the lower courts' jurisdiction to decide these cases. Franchise Tax Board was an action seeking a declaration that state laws were not

Barnett Marion is a national-bank subsidiary of a bank holding company, Barnett Banks, Inc. Barnett Marion's principal place of business is Ocala, Florida, but it maintains a branch office in Belleview, Florida. Belleview's population is fewer than five thousand, as shown by the last decennial census. Barnett purchased an insurance agency from Linda K. Clifford in Belleview. As a result, Ms. Clifford, a Florida licensed insurance agent, became an employee of Barnett Marion and maintained her office inside the bank.

The day of the purchase, Barnett Marion sought a declaration allowing it to use this branch office to "market insurance to existing and potential customers regardless of where the insurance customers are located." Barnett Marion argued that 12 U.S.C. s 92 preempted Fla.Stat. ch. 626.988, and asked the district court to find that:

> Barnett Bank and, specifically Barnett Bank Belleview, is authorized and empowered by federal law to act as an agent for any insurance company authorized by the State of Florida to do business in Florida.

(R1-1-7).

Four days later, the Florida Department of Insurance ("Department") issued an Immediate Final Order ("IFO") directing Linda Clifford and her associate agents to cease insurance agency activities other than selling credit life and credit disability insurance. Barnett Marion moved for a temporary restraining order ("TRO") and sought to enjoin the Department from acting on the IFO.

that 12 U.S.C. s 92 ("section 92") does not relate to insurance.[1] We disagree, and AFFIRM the district court judgment.

Appellee/Cross-Appellants Tom Gallagher and the Florida Department of Insurance allege the district court erred in holding section 92 permits national banks to sell insurance nationwide. Appellee/Cross-Appellants Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and the Florida Associations of Insurance Agents allege the district court erred in finding that Appellant Barnett Marion was "located and doing business in a place with a population of less than 5000" pursuant to section 92. Based on our reading of the Federal and Florida statutes, we find it unnecessary to reach either of these issues.

I. BACKGROUND

Florida law precludes bank subsidiaries or bank holding company affiliates from conducting insurance activities in Florida. Fla.Stat. ch. 626.988 (1993). Federal law, however, allows national banks--despite their status as subsidiaries or affiliates--to act as insurance agents in localities with fewer than five thousand people. 12 U.S.C. s 92 (1988).

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[1] Recently the United States Supreme Court resolved a conflict among the Circuit Courts of Appeals by holding that section 92 properly is included in s 13 of the Federal Reserve Act (Act Dec. 23, 1913, ch. 6) rather than the National Bank Act. See United States Nat'l Bank of Or. v. Indep. Ins. Agents, --- U.S. ----, ---- - ----, 113 S.Ct. 2173, 2182-86, 124 L.Ed.2d 402 (1993). Both the parties and the district court at various times refer to the section as part of the National Bank Act. While this nomenclature does not affect the section's validity in light of the Supreme Court case, for clarity's sake this Court will refer to the statute simply as "section 92."

David J. Busch, Tallahassee, FL, Scott A. Sinder, Ann M. Kappler, Arti K. Rai, Washington, DC, J. Robert McClure, Jr., F. Townsend Hawkes, Tallahassee, FL, for appellee.

Virginia B. Townes, Akerman, Senterfitt & Eidson, P.A., Orlando, FL, Anthony J. Steinmeyer, Jacob M. Lewis, U.S. Dept. of Justice, Civ. Div., Appellate Staff, Washington, DC, Daniel Y. Sumner, Florida Dept. of Ins., Tallahassee, FL, for amicus, Florida Bankers Ass'n.

Appeals from the United States District Court for the Middle District of Florida.

Before COX, Circuit Judge, FAY, Senior Circuit Judge, and CARNES*, District Judge.

* Honorable Julie E. Carnes, U.S. District Judge for the Northern District of Georgia, sitting by designation.

FAY, Senior Circuit Judge:

This appeal arises from a final order following a bench trial on the merits of plaintiff Barnett Bank of Marion County's ("Barnett Marion") suit for permanent injunctive and declaratory relief against Florida Insurance Commissioner Tom Gallagher and the Florida Department of Insurance. The Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and the Florida Associations of Insurance Agents intervened in the district court. Appellant Barnett Marion alleges the district court erred in concluding that Fla.Stat. ch. 626.988 regulates insurance, and in concluding

APPENDIX F
43 F.3d 631

BARNETT BANK OF MARION COUNTY, N.A.,
a national banking association,
Plaintiff-Counter-Defendant,
Appellant, Cross-Appellee,

v.

Tom GALLAGHER, Insurance Commissioner
of the State of Florida, Fla. Dept.
Insurance, a state agency,
Defendants-Appellees,
Cross-Appellant,

Florida Association of Life Underwriters,
Professional Insurance Agents of
Florida, Inc., Florida Associations
of Insurance Agents,
Defendants-Counter-Claimant,
Appellees-Cross-Appellants.

No. 93-3508.

United States Court of Appeals,
Eleventh Circuit.

Jan. 30, 1995.

David M. Wells, Peter E. Nicandri, Jacksonville, FL, for appellant.

See supra subsection II.C. Section 2(b) states that a federal statute must "specifically relate[ ] to the business of insurance." Although this phrase is not clearly defined, the Court in Fabe termed it a "clear statement rule." Fabe, --- U.S. at ----, 113 S.Ct. at 2211. It is apparent from the Fabe decision that an analysis of the first clause of s 2(b) requires a broader standard for the state statute at issue than for the federal statute at issue. Furthermore, cases such as Fabe reach the very result contested by plaintiffs--that a state statute can be found to regulate the business of insurance without also finding that the federal statute specifically relates to the business of insurance.

III.

Consequently, I would find that McCarran-Ferguson prevents federal preemption of section 287 and I would reverse and remand on that basis.

the taxation of insurance companies. Partially because of the exclusive insurance nature of the statute and partially because the power of federal taxation was not delegated to the states in this instance, Hanover is not persuasive here.

In Texas Employers' Ins. Ass'n v. Jackson, 820 F.2d 1406 (5th Cir.1987), cert. denied, 490 U.S. 1035, 109 S.Ct. 1932, 104 L.Ed.2d 404 (1989), the statute at issue was the Longshore and Harbor Workers Compensation Act (LHWCA). Again, the court in Jackson found overwhelming evidence within the language of the statute and its regulations to prove a pervasive regulation of the business of insurance. A similar pervasive intent to regulate the insurance business is not evident in s 92.

In Hewlett-Packard Co. v. Barnes, 571 F.2d 502 (9th Cir.), cert. denied, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978), an ERISA provision was at issue. Once again, however, regulation of the business of insurance pervades ERISA. Not only have numerous courts agreed that ERISA specifically relates to the business of insurance, ERISA's "deemer" clause explicitly exempts state employee benefit plans from the preemption language of McCarran-Ferguson.

Finally, plaintiffs and an amicus brief from the American Bankers Association argue that if section 287 is found to regulate the business of insurance, then s 92 must also be found to specifically relate to the business of insurance. According to plaintiffs, common sense dictates that the definition of s 2(b)'s "business of insurance" be applied equally to both Kentucky's section 287 and s 92. The plaintiffs' argument is flawed, however, in its disregard for the exact wording of the statute.

specifically with reference to insurance in enacting the law" would such a law preempt any state statute enacted to regulate the business of insurance. Id. at ---- n. 7, 113 S.Ct. at 2211 n. 7. Therefore, " 'no existing law and no future law should, by mere implication, be applied to the business of insurance.' " Id. (quoting 91 Cong.Rec. 1487 (1945)).

The context of s 92 has always been within the regulation of banking rather than insurance. In United States Nat'l Bank of Oregon v. Independent Insurance Agents of America, --- U.S. ----, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993), in which the Court upheld the viability of s 92, the Court emphasized that s 92 was part of the Federal Reserve Act. Id. at ----, 113 S.Ct. at 2182. The court in Barnett Banks relied on the language of Independent Ins. Agents stating that s 92 was to be read in context with the other paragraphs around it and the fact that neither the Independent Ins. Agents Court nor Congress ever suggested that s 92 was specifically related to the business of insurance. Therefore, s 92 was found not to specifically relate to the business of insurance. Barnett Banks, 839 F.Supp. at 843.

Furthermore, no party has cited to any case in support of the contention that s 92 specifically relates to the business of insurance. The banks point to several cases in which other federal statutes were found to "specifically relate to the business of insurance" within the context of McCarran-Ferguson. None of these cases, however, is persuasive or applicable to the issue in this case. In Hanover Ins. Co. v. Commissioner of Internal Revenue, 598 F.2d 1211 (1st Cir.), cert. denied, 444 U.S. 915, 100 S.Ct. 229, 62 L.Ed.2d 169 (1979), the statute at issue was an Internal Revenue Service provision dealing exclusively with

2. Section 92: Not Specifically Related to the Business of Insurance

The second step in this McCarran-Ferguson analysis is to determine whether s 92 "specifically relates to the business of insurance." McCarran-Ferguson s 2(b). Because it decided that section 287 was not enacted to regulate the business of insurance, the majority declined to consider this issue. However, there is little doubt that, as the district court determined below, s 92 does not specifically relate to the business of insurance. Owensboro Nat'l Bank, 803 F.Supp. at 34-35. Rather, s 92's "primary intent was to strengthen small national banks by providing them with an additional source of revenue." Id. (citations omitted). As the district court further stated, the mere fact that "the power granted to the national banks involves insurance does not transform this section into a regulation of the business of insurance." Id. at 36. On this issue, the district court's analysis is sound and should be followed by this Court.

The plaintiffs maintain, however, that s 92 does specifically regulate the business of insurance. The Supreme Court has not been explicitly clear how "specific" a federal statute must be to preempt a state law which regulates the business of insurance. The Fabe Court came the closest to a firm definition in determining that McCarran-Ferguson calls for a "clear statement rule." Fabe, --- U.S. at ----, 113 S.Ct. at 2211. According to this rule, a federal statute such as s 92 must "clearly state" that it regulates the business of insurance or otherwise intends to preempt a contrary state law. Id. Upon examining the legislative history of McCarran-Ferguson, the Court found that only when "Congress, in its wisdom, [acted]

Kentucky's Insurance Code, and is thus primarily intended to regulate bank holding companies rather than insurance. As the Supreme Court has said on this issue, however, " 'mere matters of form need not detain us.' " Fabe, --- U.S. at ----, 113 S.Ct. at 2210 (quoting National Secs., 393 U.S. at 460, 89 S.Ct. at 568). It is not enough to state baldly that because the particular statute does not fall directly within the Insurance Code, it does not regulate the business of insurance. "Instead, the Court must attempt to gauge the larger intent and design" of section 287. Barnett Banks, 839 F.Supp. at 840.

Accordingly, it is enough that a state undertakes to regulate insurance generally for a specific statute or practice to fall within the meaning of McCarran-Ferguson. McIlhenny v. American Title Ins. Co., 418 F.Supp. 364, 369 (E.D.Pa.1976). It is well-established that the McCarran-Ferguson Act's "state regulation" requirement is satisfied by the general undertaking by a state to regulate the insurance industry. See Federal Trade Comm'n v. National Casualty Co., 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958); Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178 (6th Cir.1971), cert. denied, 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972). As illustrated by another circuit: "State power to regulate necessarily includes the discretion to prohibit, permit, or limit insurance practices as the state sees fit." Dexter v. Equitable Life Assurance Soc'y, 527 F.2d 233, 236 (2d Cir.1975).

It is my opinion, therefore, that the district court erred in its holding. Contrary to the majority's opinion, I believe that section 287 was enacted to regulate the business of insurance.

between insurer and insured at its most basic level. In a 1981 Advisory Opinion the Kentucky Attorney General outlined the amendments which led to section 287 and stated that it was "the clear intent of the legislature to limit the involvement of majority bank shareholders, including one-bank holding companies, in insurance related activities." Ky.Op.Att'y Gen. 81-173 (1981). Later, a Kentucky House Resolution stated: "if banks were licensed to sell homeowners, automobile, and other lines of insurance, the consumer could feel coerced into purchasing insurance from the bank to obtain the loan regardless of the insurance premium." Ky.H.R. 91-SS-BR-198 (1991). The legislature enacted the statute out of a direct concern for future policyholders. It cannot be disputed, therefore, that section 287 was aimed to protect the insurance relationship between insurers and policyholders.

Obviously, the Kentucky legislature was concerned that if banks, national or state, were able to sell general insurance to their customers, the banks could unduly influence those Kentucky citizens and jeopardize the ability to pay claims when demands were made. See Barnett Banks, 839 F.Supp. at 840. The state has an important interest in protecting its citizens by ensuring that insurance companies remain solvent. Id. In an effort to protect the interests of its citizens, the Kentucky legislature should not be so constrained that all legislation intended to regulate the insurance industry, " 'directly or indirectly,' " must be located only within its Insurance Code. National Secs., 393 U.S. at 460, 89 S.Ct. at 569.

The district court in the case at hand also was persuaded by plaintiffs' argument that section 287 does not regulate the business of insurance because it is not contained within

potential policyholding public, [to] regulate[ ] the potential policyholding public and, therefore, [was] a 'law enacted for the purpose of regulating the business of insurance' within the meaning of McCarran-Ferguson." Barnett Banks, 839 F.Supp. at 840-41 (quoting Fabe and s 2(b) of McCarran-Ferguson).

Even if the majority is correct in distinguishing statutes that regulate persons from those that regulate the manner in which an activity is conducted, it improperly fails to consider whether section 287 regulates the business of insurance indirectly. When Congress enacted the McCarran-Ferguson Act, it envisioned the "business of insurance" to focus upon those statutes "aimed at protecting or regulating [the relationship between insurer and policyholder], directly or indirectly ...." National Secs., 393 U.S. at 460, 89 S.Ct. at 569 (emphasis added). Therefore, it is sufficient for the Kentucky legislature to indirectly govern the relationship between an insurance company and future policyholders by enacting a statute such as section 287 to regulate those persons the state wishes to exclude from the insurance industry. See also Hoylake Inv. Ltd. v. Washburn, 723 F.Supp. 42 (N.D.Ill.1989) (finding that an Illinois statute regulated the policyholder relationship in part because of the state's concern for the future solvency of its insurance companies). Whether a state chooses to regulate its insurance industry by prohibiting particular persons, entities, activities, or conduct--directly or indirectly--is immaterial. If the state aims to protect or regulate the insurer/insured relationship, it is regulating the business of insurance. National Secs., 393 U.S. at 460, 89 S.Ct. at 569.

By enacting section 287, the Kentucky legislature likewise intended to protect and regulate the relationship

1. Section 287: Enacted to Regulate the Business of Insurance

The proper standard to apply, therefore, when determining whether the Kentucky statute at issue falls within the intended scope of McCarran-Ferguson, is to examine whether the statute is centrally concerned with policyholders. Defendants allege that section 287 was enacted to regulate the business of insurance. According to Fabe, this means the statute must have been enacted to protect or regulate the relationship between the insurer and the policyholder.

According to the majority, section 287 merely regulates a group of people which it intended to prevent from entering the insurance industry. Such exclusion of a person from participation in an activity is not viewed by the majority as regulation of the activity itself. I do not agree with this concept.

The only other federal court to address this issue recently examined a Florida statute that prevented insurance agents associated in any way with a financial institution from engaging in insurance agency activities. Barnett Banks v. Gallagher, 839 F.Supp. 835 (M.D. Fla.1993). The Florida statute and section 287 therefore achieve the same goal--to prevent banks from selling general insurance--by slightly different means. Florida's statute restricted the activities of insurance agents while Kentucky's section 287 restricts the activities of bank holding companies. Like section 287, the Florida statute regulates a particular group of people by prohibiting them from entering the insurance industry. Unlike the majority in the case at hand, however, the court in Barnett Banks gauged the "larger intent" of the Florida statute and found the law was enacted to " 'further[ ] the interests' of the

D. McCarran-Ferguson Analysis--First Clause of s 2(b)

After the Fabe Court distinguished the first and second clauses of s 2(b) from one another, it further examined the history of McCarran-Ferguson to determine Congress's intent in drafting the first clause of s 2(b). Congress's reaction to the Supreme Court decision in South-Eastern Underwriters arose in part from its concern with the nature of the insurance contract. In enacting McCarran-Ferguson, Congress intended for the contract between an insurer and its policyholder to be controlled and regulated by the state. The legislation was aimed at:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement--these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the "business of insurance."

Securities and Exch. Comm'n v. National Secs., Inc., 393 U.S. 453, 460, 89 S.Ct. 564, 568-69, 21 L.Ed.2d 668 (1969).

developed out of these cases when the second clause of s 2(b) was at issue. The district court in the case at hand understandably relied on Pireno 's tripartite test because Fabe had not yet been decided. In light of Fabe, however, I believe that both the district court's and the majority's reliance on Pireno is misplaced. For example, the majority relied on language from Fabe "that Pireno 'identified the three criteria ... that are relevant in determining what activities constitute the "business of insurance." ' " Maj. opinion at p. 392 (quoting Fabe, --- U.S. at ----, 113 S.Ct. at 2208). However, this quotation appeared in the Fabe Court's presentation of the issues, before the Court actually analyzed Pireno and distinguished it from the Ohio statute then being considered. In its subsequent analysis of Pireno, the Court clearly limited the scope and application of Pireno 's tripartite test stating: "Pireno and Royal Drug held only that 'ancillary activities' that do not affect performance of the insurance contract or enforcement of contractual obligations do not enjoy the antitrust exemption for laws regulating the 'business of insurance.' " Fabe, --- U.S. at ----, 113 S.Ct. at 2209 (quoting Pireno, 458 U.S. at 134 n. 8, 102 S.Ct. at 3011 n. 8) (emphasis added). Furthermore, the Court distinguished the Ohio statute from Pireno stating that Pireno should "not [be] read ... to suggest that the business of insurance is confined entirely to the writing of insurance contracts, as opposed to their performance." Id.

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risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. Pireno, 458 U.S. at 129, 102 S.Ct. at 3009.

clauses do not use identical language, rather "the first clause contains the word 'purpose,' a term that is significantly missing from the second clause." Id. Failure to distinguish the first clause of s 2(b) from the second clause therefore "overlooks another maxim of statutory construction: 'that a court should "give effect, if possible, to every clause and word of a statute."'" Id. (citations omitted). Therefore, the majority here cannot justify its failure to distinguish between the two parts of s 2(b) by "assur[ing]" us that the "business of insurance" has only one meaning. Maj. opinion at pp. 391-92.

Clearly, the first clause applies to a broader category of laws than the second clause. However the Court did more than "merely note" that the scope of the first and second clause of s 2(b) are "different," as the majority described the holding of Fabe. Maj. opinion at pp. 391-92. Rather, the Fabe Court described the first clause as applicable to "laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." Id. at ----, 113 S.Ct. at 2210 (citation omitted). "This category necessarily encompasses more than just the 'business of insurance.' " Id.

Several prominent cases before Fabe dealt with the "business of insurance" within the meaning of the second clause of s 2(b). See Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979). A tripartite test[3] consequently

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[3] Pursuant to Pireno 's tripartite test, the "business of insurance" under the second clause of s 2(b), is determined by considering the following: [F]irst, whether the practice has the effect of transferring or spreading a policyholder's

saves applicable state laws from federal preemption. The second clause, however, exempts from preemption "only 'the business of insurance' itself from the antitrust laws." Fabe, --- U.S. at ----, 113 S.Ct. at 2209 (quoting s 2(b) of McCarran-Ferguson) (emphasis added).

Thus, the Fabe Court explicitly distinguished the first clause of s 2(b) from the second clause, making it clear that the first clause "is not so narrowly circumscribed" as the second clause of s 2(b). Id. As the Court stated,

> The language of s 2(b) is unambiguous: the first clause commits laws "enacted ... for the purpose of regulating the business of insurance" to the States, while the second clause exempts only "the business of insurance" itself from the antitrust laws. To equate laws "enacted ... for the purpose of regulating the business of insurance" with the "business of insurance" itself, as petitioner urges us to do, would be to read words out of the statute. This we refuse to do.

Id. at ----, 113 S.Ct. at 2209-10 (footnote omitted).

The Court further disputed the allegation that it was violating a " 'basic rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.' " Fabe, --- U.S. at ---- n. 6, 113 S.Ct. at 2210 n. 6. According to the Court, "[t]his argument might be plausible if the two clauses actually employed identical language." Id. As the Court illustrated, however, the two

Kentucky statute was not enacted to regulate the business of insurance. Owensboro Nat'l Bank v. Moore, 803 F.Supp. 24, 36 (E.D.Ky.1992). The district court's holding was based in part on the location of section 287 in the chapter of the Kentucky Revised Statutes regulating banks and trust companies. The lower court also based its decision on the three-part test set out in Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982). In its opinion, the majority also relied upon Pireno to determine what activities constitute the "business of insurance."

I respectfully disagree that the Pireno factors apply to this case. Rather, I believe that the defendants are correct that the Supreme Court's recent opinion in United States Department of Treasury v. Fabe, --- U.S. ----, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), sets the controlling criteria in this case. See also Colonial Life and Accident Ins. Co. v. American Family Life Assurance Co., 846 F.Supp. 454, 459 (D.S.C.1994) ("while ... the Pireno criteria are relevant in determining the applicability vel non of the antitrust exemption, they are not determinative with respect to the first clause of Section 2(b)").

C. Fabe and the application of s 2(b)

In Fabe, the Court held that an Ohio priority statute was saved from federal preemption to the extent that it regulated the relationship between an insurance company and its policyholders. Fabe, --- U.S. at ----, 113 S.Ct. at 2208. The Court, in its analysis, made an important distinction between the first and second clauses of s 2(b). According to the Court, the first clause deals with those state laws (such as section 287) enacted for the purpose of regulating insurance. The clause

L.Ed.2d 702 (1980). The enactment of the McCarran-Ferguson Act represents such a situation in which, once the Supreme Court held that the regulation of interstate insurance was within Congress's commerce power, Congress exercised its plenary power by enacting McCarran-Ferguson to limit its own power by providing for regulation by the states instead.

B. Kentucky Section 287

Section 287.030(4) of the Kentucky Revised Code purports to prevent state or national banks from selling any insurance other than those narrow categories permitted by the statute. The applicable language of the statute reads:

> (4) No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of real property mortgagee in mortgaged property, other than title insurance.

Ky.Rev.Stat.Ann. s 287.030 (Baldwin 1987). In a 1970 opinion, the Kentucky Attorney General determined that the provision applied to state banks as well as national banks doing business in Kentucky. Ky.Op.Att'y Gen. 70-643 (1970).

Defendants contend that section 287 "falls squarely" within s 2(b)'s requirement that a state statute be enacted to regulate the business of insurance to escape preemption by federal law. The district court found, to the contrary, that the

insurance activity was within the Commerce Clause power of Congress. Id. at 553, 64 S.Ct. at 1173. Congress responded adversely to the Court's decision, immediately enacting McCarran-Ferguson "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." Securities and Exchange Comm'n v. National Secs., Inc., 393 U.S. 453, 459, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969).

Consistent with its view that the business of insurance is " 'a local matter, to be subject to and regulated by the laws of the several States,' " Congress explicitly intended the McCarran-Ferguson Act to restore state taxing and regulatory powers over the insurance business to their pre-South-Eastern Underwriters scope. Western and Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 654, 101 S.Ct. 2070, 2075, 68 L.Ed.2d 514 (1981) (citing H.R.Rep. No. 143, 79th Cong., 1st Sess. 2 (1945)). Undeniably, the purpose of the McCarran-Ferguson Act was to "give support to the existing and future state systems for regulating and taxing the business of insurance." Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429, 66 S.Ct. 1142, 1155, 90 L.Ed. 1342 (1946).

Clearly, Article I, Section 8 of the United States Constitution grants Congress the power to regulate interstate commerce, including interstate insurance, if it so chooses. U.S. Const., Art. I, s 8, cl. 3; see also South-Eastern Underwriters, 322 U.S. at 539-45, 64 S.Ct. at 1166-69. It is nonetheless true that Congress may limit its own Commerce Clause power to grant the states "an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44, 100 S.Ct. 2009, 2020, 64

I agree with the majority's analysis of the first and third issues raised by the defendants. I respectfully disagree, however, with the majority's opinion on the issue of McCarran-Ferguson preemption. It is my belief that the McCarran-Ferguson Act does, in fact, shield the state statute, section 287, from preemption by the federal statute, s 92.

II.

As the majority accurately states, the McCarran-Ferguson Act, 15 U.S.C. s 1012(b) (referred to hereafter as s 2(b)), protects section 287 from preemption by s 92 if two factors are satisfied. First, the state statute, section 287, must have been "enacted ... for the purpose of regulating the business of insurance." McCarran-Ferguson s 2(b). Second, the federal statute, s 92, must not "specifically relate[ ] to the business of insurance." Id. If both of these requirements are met, the state statute will not be preempted by the federal statute.

In this case, I believe both factors have been satisfied. First, section 287 was clearly enacted by the Kentucky legislature to regulate the business of insurance. Second, s 92 does not specifically relate to the business of insurance.

A. McCarran-Ferguson

The McCarran-Ferguson Act was enacted by Congress in 1945 in response to the Supreme Court's decision in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). In South-Eastern Underwriters, the Court held that regulation of interstate

thereof.

12 U.S.C. s 1846 (emphasis added). Here, s 92 is the provision that prevents Kentucky from exercising the power to enforce section 287. Section 92 is found in chapter 2 of title 12, while s 1846 is found in chapter 17 of that title. Since s 92 is a provision of a chapter other than the chapter in which s 1846 is found, s 92 may be construed to prevent Kentucky from exercising the power to enforce section 287. Section 1846 simply is irrelevant to this case.

AFFIRMED.

BATCHELDER, Circuit Judge, dissenting.

I disagree with the majority's decision affirming the district court in granting summary judgment and injunctive relief for the plaintiffs. Therefore, I respectfully dissent from the Court's opinion.

I.

Defendants-Appellants present three central arguments in this appeal:

(1) that Kentucky Revised Code s 287.030(4) ("section 287") is not preempted by 12 U.S.C. s 92 under traditional preemption analysis; (2) that the McCarran-Ferguson Act protects section 287 from preemption by s 92; and (3) that section 287 cannot be preempted by s 92 because of language contained in the Bank Holding Company Act (BHCA).

set standards for "the actual performance of an insurance contract." --- U.S. at ----, 113 S.Ct. at 2210. See also United Servs. Auto. Ass'n v. Muir, 792 F.2d 356, 364 (3rd Cir.1986) (state law forbidding banks from being licensed as insurers "ha[d] no part in the business of insurance under McCarran-Ferguson"); but see SEC v. National Securities, Inc., 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969) (stating in dicta that state laws governing "the licensing of [insurance] companies and their agents ... [are] within the scope of" McCarran- Ferguson).

Since we conclude that section 287 was enacted for the purpose of regulating certain conduct by bank holding companies, not the business of insurance, we need not consider whether s 92 "specifically relates to the business of insurance"; for, without regard to whether s 92 so relates, McCarran-Ferguson cannot save section 287 from preemption.

Defendants' remaining argument is that section 287 cannot be preempted by s 92 because "section 7 of the Bank Holding Company Act [12 U.S.C. s 1846] expressly reserves to the Commonwealth the authority to regulate bank holding companies, and their subsidiaries, through state regulation such as [section 287]." (Defendants' Brief at 28.) In making this argument, defendants ignore the plain language of s 1846, which provides:

> No provision of this chapter shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries

of s 1012(b), that Pireno "identified the three criteria ... that are relevant in determining what activities constitute the 'business of insurance.' ") (emphasis added). In short, the Fabe Court merely noted that the scope of the respective immunities created by the first and second clauses of s 1012(b) are different; it assuredly did not give "business of insurance" one meaning in the first clause and a different meaning in the second.

The Fabe Court went on to hold that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." --- U.S. at ----, 113 S.Ct. at 2210. Thus, to have been "enacted ... for the purpose of regulating the business of insurance," section 287 must possess the aim of regulating activities that meet the Pireno criteria.

Section 287 does not possess such an aim. That section helps to define the powers of Kentucky bank holding companies by excluding such companies from participation in the activities that constitute the "business of insurance." Excluding a person from participation in an activity, however, is different from regulating the manner in which that activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity.

Section 287 only regulates persons owning "more than one-half (1/2) of the capital stock of a bank"; it in no way governs the manner in which the activities constituting the "business of insurance" are conducted. Section 287 thus is different in kind from the Ohio statute that was found to regulate the business of insurance in Fabe, since the Ohio statute

> of the policy relationship between the insurer and insured; and third, whether the practice is limited to entities within the insurance industry.

Id. at 129, 102 S.Ct. at 3009.

Citing United States Department of Treasury v. Fabe, --- U.S. ----, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), however, defendants contend that the Pireno criteria are "not applicable" to the determination of whether a state law was "enacted ... for the purpose of regulating the business of insurance." (Defendants' Brief at 24 n. 22.) We disagree. It is true that Pireno addressed the scope of the antitrust immunity arising under the second clause of s 1012(b). That clause provides an exemption from federal antitrust laws for activities that (1) are regulated by state law and (2) qualify as the "business of insurance." See 15 U.S.C. s 1012(b). Thus, "the first clause [of s 1012(b)] commits laws 'enacted ... for the purpose of regulating the business of insurance' to the States, while the second clause exempts only 'the business of insurance' itself from the antitrust laws." Fabe, --- U.S. at ----, 113 S.Ct. at 2209. Whether a particular activity is part of the "business of insurance" is, of course, a separate question from whether a state law was "enacted ... for the purpose of regulating the business of insurance." The Fabe Court accordingly noted that the latter question cannot be answered by reference to the Pireno criteria alone. But that does not mean those criteria simply are "not applicable" in cases involving the first clause of s 1012(b). If, in such a case, the issue arises of whether a particular activity is part of the "business of insurance," the Pireno criteria apply. See Fabe, --- U.S. at ----, 113 S.Ct. at 2208 (noting, in considering claim that arose under first clause

S.Ct. at 3024 (emphasis added). Like the district court, we conclude that, under conventional preemption analysis, s 92 preempts section 287.

Defendants next argue that the McCarran-Ferguson Act, 15 U.S.C. s 1011 et seq., "immunizes" section 287.030(4) from preemption by s 92. The relevant portion of the McCarran-Ferguson Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance....

15 U.S.C. s 1012(b). Thus, section 287.030(4) is not preempted by s 92 if (1) section 287 was "enacted ... for the purpose of regulating the business of insurance," and (2) s 92 does not "specifically relate[ ] to the business of insurance."

We first consider whether section 287 was "enacted ... for the purpose of regulating the business of insurance." The "business of insurance" is made up of "practices" and "activities" that satisfy the criteria set forth in Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982). Those criteria are:

> first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part

to conclude that it does not exist.[2]

Defendants also contend that our construction of s 92 assumes that Congress acted with an "unconstitutional motive" in passing s 92, since the regulation of the business of insurance was understood to be beyond Congress's Commerce Clause powers when s 92 was passed in 1916. But s 92 in no way governs the manner in which the business of insurance is conducted; rather, it merely helps to define the powers of national banks. Congress has been understood to have the authority to define those powers since the Court's decision in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), so we reject defendants' contention.

Finally, we note that section 287 interferes with the realization of a chief object of s 92. That object is to increase the number of banks serving small towns by creating "additional sources of revenue" for such banks. Letter from Comptroller John Skelton Williams to Sen. Robert L. Owen, reprinted in 53 Cong.Rec. 11001 (1916). (App. at 159). Section 287 removes that source of revenue and thus "create[s] 'an obstacle to the accomplishment and execution of the full purposes and objectives [of Congress].' " de la Cuesta, 458 U.S. at 156, 102

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[2] The United States emphasizes that, in a 1990 letter to the Louisiana Commissioner of Insurance, the Chief Counsel of the Office of the Comptroller concluded that the right created by s 92 is not subject to state law restrictions. Because we reach the same conclusion without taking this letter into account, we need not determine whether such an informally expressed opinion is entitled to deference under the doctrine set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

include such clauses in loan instruments. Noting that the conflict between the state law and federal regulation did not "evaporate" because the "regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts[,]" id. at 155, 102 S.Ct. at 3023, the Court easily concluded that preemption was appropriate. Id. at 159, 102 S.Ct. at 3025.

The conflict between section 287 and s 92 is no different than those present in Franklin National Bank and de la Cuesta. For purposes of deciding the federal preemption issue only, the plaintiff national banks assumed as correct the Commissioner's position that section 287 applies not only to bank holding companies but also to subsidiaries thereof, such as national banks. Thus, while s 92 provides that national banks such as plaintiffs "may" act as insurance agents, section 287 provides that they "may not."

Seizing upon the permissive nature of the right created by s 92, however, defendants suggest that we should "reconcile" the two sections by construing the right created by s 92 to be subject to state law restrictions such as section 287. That construction might be plausible if s 92 provided that certain national banks "may have the power" to act as insurance agents. But s 92 actually states that certain national banks "may, under such rules ... as may be prescribed by the Comptroller of the Currency, act as the agent for" certain insurance companies. Providing that a bank "may act" is no different than providing that a bank "shall have the power to act." Thus, the language of s 92 does not permit the construction defendants advocate. That the power created by s 92 is permissive does not allow us

12 U.S.C. s 92.

It is well settled that "the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law." Hillsborough County v. Automated Medical Labs., 471 U.S. 707, 712, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). One of the ways in which a state law may "interfere" with a federal law is by coming into "actual[ ] conflict[ ]" with it, i.e., by " 'stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]' " Id. at 713, 105 S.Ct. at 2375.

The Supreme Court has applied this "actual conflict" standard in cases with facts similar to those presented here. In Franklin National Bank v. New York, 347 U.S. 373, 74 S.Ct. 550, 98 L.Ed.2d 767 (1954), the Court considered whether a New York law that prohibited use of the word "savings" in advertising for banks other than state-chartered savings banks was preempted by a federal law that authorized national banks "to receive deposits without qualification or limitation, and ... [to] possess 'all such incidental powers as shall be necessary to carry on the business of banking[.]' " Id. at 376, 74 S.Ct. at 553. Although the federal law only implicitly permitted federal banks to use the word "savings" in their advertising, the Court concluded that there was "a clear conflict between the law of New York and the law of the Federal Government." Id. at 378, 74 S.Ct. at 554. Similarly, in Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982), the Court considered whether a California law that prohibited the inclusion of a due-on-sale clause in loan instruments was preempted by a federal regulation that expressly granted to federal savings and loans the power to

mortgagee in mortgage property, other than title insurance.

Ky.Rev.Stat.Ann. s 287.030(4). Section 92 provides:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: Provided, however, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: And provided further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

(2)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FIRST ADVANTAGE INSURANCE, INC., *et al.*,

Petitioners,

v.

DOUGLAS D. GREEN, COMMISSIONER OF INSURANCE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal for the First Circuit, State of Louisiana

BRIEF OF THE *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, *ET AL.*, IN SUPPORT OF PETITIONERS

JAMES T. MCINTYRE
CHRYS D. LEMON
MCNAIR LAW FIRM, P.A.
1155 15th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 659-3900
Of Counsel and Attorneys for Association of Banks in Insurance, Inc.

JOHN J. GILL III
Counsel of Record
MICHAEL F. CROTTY
MATHEW H. STREET
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026
Attorneys for Amici Curiae

MARY E. ARCENEAUX
LOUISIANA BANKERS ASSOCIATION
P.O. Box 2871
Baton Rouge, LA 70802
(504) 387-3282

July 17, 1995

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QUESTIONS PRESENTED

1. Whether a federal banking statute that grants authority to national banks operating in towns having a population not exceeding 5,000 inhabitants to sell all types of insurance, as an agent (12 U.S.C. § 92 (1994)), is preempted by a state banking statute prohibiting state-chartered banks from carrying on such activities.

2. Whether a state banking law prohibiting all banks from selling insurance is a law enacted for the purpose of regulating the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988).

3. Whether 12 U.S.C. Section 92 "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

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To the Court of Appeal for the First Circuit,
State of Louisiana

BRIEF OF THE *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, *ET AL.*, IN SUPPORT OF PETITIONERS

The American Bankers Association, *et al.*, hereby respectfully submit this brief as *amici curiae* in support of the Petitioners in accordance with the provisions of S. Ct. R. 37.2. All parties have consented to this filing, and their written consents are filed with this brief.

INTERESTS OF THE *AMICI CURIAE*

The *amici* are two national banking trade associations and the statewide banking trade association of Louisiana. The *American Bankers Association* (ABA) is the principal national trade association of the commercial banking industry in the United States, representing banks located in each of the fifty states and the District of Columbia, banks of all sizes, and both national and state-chartered banks. Assets of ABA member banks comprise over ninety percent of the domestic assets of all commercial banks in the country.

The *Association of Banks in Insurance, Inc.* (ABI) is a national trade association of financial institutions and insurance companies with an interest in insurance activities. ABI was organized to protect and further bank insurance powers. Its members include insurance companies, banks, and bank holding companies owning national and state banks, and other companies engaged in the insurance business.

The *Louisiana Bankers Association* (LBA) is the principal trade association for the commercial banking industry in Louisiana. The LBA is comprised of some ninety-fix percent of federally-chartered and state-chartered commercial banks in Louisiana, many of which are located in towns having a population not exceeding 5,000. It also has savings and loan associations as members. Since many LBA members are located in

"small towns," this case presents issues of direct and immediate importance to the LBA and its many members, who should be eligible to sell insurance as agents from small towns. It has many bank members who will be directly affected by the outcome of this litigation.

Section 92 of the National Bank Act, 12 U.S.C. Section 92 (1994), authorizes national banks in small towns (*i.e.*, towns having a population not exceeding 5,000) to engage in general insurance agency activities, the existence and breadth of which authority was upheld in *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173 (1993) and *Independent Ins. Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). The decision of the Louisiana Court of Appeal for the First Circuit would allow a state to interfere with this authority via a state statute that clearly conflicts with Section 92. Approximately twenty other states have anti-competitive statutes similar in effect (if not in exact form[1]) to Louisiana's, which attempt to single out banks

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[1] The Louisiana statutes involved in this litigation differ from the "anti-affiliation" statutes upheld in other cases. The Louisiana statutes define the powers of state-chartered banks and the State Banking Commissioner and proscribe certain insurance activities by state-chartered banks. Although the statutes by their terms and placement affect only state-chartered entities, they, when applied by the Louisiana Department of Insurance and Louisiana courts to national banks, are being applied as a *restriction on federally-authorized powers*. In comparison, the statutes at issue in *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir.), *petition*

by barring them from insurance sales activities. The *amici* have members in these states, who would be adversely affected if the Louisiana state court decision is not overturned, because it would set a precedent for these states to use to deny national banks the ability to exercise powers unequivocally granted by Congress to sell insurance in small towns.

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for cert. filed, 63 U.S.L.W. 2478 (U.S. May 8, 1995) (No. 94-1837) and in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), are so-called "anti-affiliation" statutes. Anti-affiliation statutes prevent banks from engaging in certain insurance agency activities, but they do so by *prohibiting affiliations between insurance agencies and banks*. Many states construe these anti-affiliation statutes to apply to national banks. Whether the statute in question involves an attempt to restrict a bank's inherent powers -- as is the case here -- or to prohibit affiliations between banks and insurance agencies -- as in the *Owensboro* and *Barnett* cases -- the effect is the same: The state statute is used to prevent national banks from exercising powers authorized under federal law. Most importantly, under either approach, courts deciding against bank interests have relied on the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988), to alter what otherwise would be preemption by federal law of the state statute as it applies to national banks.

Furthermore, by 1995 La. Acts 681, the Louisiana Legislature amended the Louisiana statutes to expressly confer upon state banks the power to sell insurance as agent, to the same extent as that power is enjoyed by federally-chartered banks. The Louisiana court held national banks' powers under Section 92 are restricted by state law; but state law now defers to federal law under Act 681.

This is the second of what *amici* expect to be three cases the Court will be asked to consider that involve this important federal-state issue within the context of the McCarran-Ferguson Act. *See Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir.), *petition for cert. filed*, 63 U.S.L.W. 2478 (U.S. May 8, 1995) (No. 94-1837); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994).

REASONS FOR GRANTING THE WRIT

Federal law, in the form of the National Bank Act, 12 U.S.C. § 21 *et seq.* (1994), is the paramount authority for the establishment and operation of national banking associations; by itself, it constitutes a complete system for the formation and governance of national banks. *First Nat'l Bank in Plant City, Fla. v. Dickinson*, 369 U.S. 122, 131 (1969); *Dietrick v. Greaney*, 309 U.S. 190, 193 (1940). National banks are also subject to state laws, but only so long as those laws do not conflict with or frustrate the purpose of the laws of the United States. *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985-86 (3rd Cir. 1980); *Starr v. O'Connor*, 118 F.2d 548, 555 (6th Cir. 1941). State laws which frustrate, burden or impede a federal purpose are nullities. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). The decision of the Louisiana Court of Appeal for the First Circuit thwarts the preeminence of federal law in effecting national bank powers and frustrates, burdens, and impedes the will of Congress. The state court misinterpreted, misconstrued

and misapplied the two tests of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988), that are used to determine if a state law survives a conflicting federal law. In so doing, it sanctioned the use of a state banking statute governing only state-chartered banks to block a national bank's exercise of a duly authorized power to engage in general insurance agency activities -- a power whose vitality pursuant to Section 92 of the National Bank Act, 12 U.S.C. § 92 (1994), is unquestioned.[2]

I. THE CONFLICT BETWEEN THE LOUISIANA COURT OF APPEAL FOR THE FIRST CIRCUIT AND A UNITED STATES CIRCUIT COURT OF APPEALS

The Louisiana Court of Appeal decision[3] directly conflicts with a recent case from the United States Court of Appeals for the Sixth Circuit. *See Owensboro Nat'l*

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[2] The state court briefly addressed Petitioners' claim that the Louisiana statutes violated the Equal Protection Clauses of both the federal and Louisiana constitutions. With very little analysis, the state court denied this claim, notwithstanding that under Louisiana law all financial institutions similarly situated to banks, such as state and federal savings and loan associations and state and federal credit unions, can act as insurance agents in Louisiana and that such authority is denied to banks alone. *See* Petition at 34a-35a.

[3] The Louisiana Supreme Court denied the Petition for Writ of Certiorari and/or Review, *see First Advantage Ins., Inc. v. Green*, 654 So. 2d 331 (La. 1995) (reprinted in Petition at 36a), thus rendering the Louisiana Court of Appeal for the First Circuit the state court of last resort.

Bank v. Stephens, 44 F.3d 388 (6th Cir. 1994).[4] The Louisiana state court adopted the rationale of the Eleventh Circuit in *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir.), *petition for cert. filed*, 63 U.S.L.W. 2478 (U.S. May 8, 1995) (No. 94-1837). Absent this Court's involvement, the differing results reached in these cases will allow jurisdictions where the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988), has been interpreted as permitting a state statute restricting bank insurance activities, to preempt a federal statute, thereby preventing national banks in small towns from exercising powers Congress intended them to exercise without constraint. Unlike the Sixth Circuit in the *Owensboro* case, the Louisiana state court clearly misapplied precedent of this Court in upholding the Louisiana statutes via reliance upon the McCarran-Ferguson Act. Your *amici* concur in the argument presented in the Petition, but want to bring to this Court's attention further discussion of the relevant precedent and impact on the business of banking if this decision is left standing.

The state court's holding that the Louisiana statutes in question "regulat[e] the business of insurance" is contrary to the Sixth Circuit's correct application to a similar state statutory regime of *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993) and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). In *Fabe*, this Court addressed whether an Ohio statute conferring only fifth priority upon claims of the United States in proceedings to liquidate an insolvent insurance company

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[4] Your *amici* expect a petition for certiorari to be filed with the Court in *Owensboro Nat'l Bank v. Stephens*.

was a law enacted "for the purpose of regulating the business of insurance." The statute attempted to protect a policyholder trying to enforce performance of an insurance contract with an insolvent insurance company; an insurer-policyholder relationship already existed. In its determination of whether the state statute was a law enacted "for the purpose of regulating the business of insurance," the Court focused solely on whether the state statute in any manner attempted to affect the contractual relationship between an insurer and a policyholder. In discussing the Court's prior holding in *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969), to determine what activities constitute the "business of insurance," this Court noted that "[*National Sec.*] emphasized that the focus of McCarran-Ferguson is upon the *relationship* between the insurance company and its policyholders." *Fabe*, 113 S. Ct. at 2208 (emphasis added). *National Sec.*, accordingly, declared that:

> "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement -- these were the core of the 'business of insurance.' Undoubtedly, other activities of *insurance companies* relate so closely to their status as *reliable insurers* that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was -- it was on the *relationship* between the insurance company and the policyholder."

Id. (emphasis added) (citation omitted).

The Louisiana Court of Appeal for the First Circuit grievously misapplied *Fabe* by upholding a statutory scheme that does not attempt to regulate a relationship between a policyholder and an insurer. The error in the state court's decision is that LA. REV. STAT. ANN. Sections 6:121(B)(2), 6:242(A)(6), and 6:513(3) (West 1954 & Supp. 1995) do not focus on the *relationship* between the insurance company and the policyholder; rather, they focus exclusively on the form in which the *agent* conducts its business. In doing so, the state court fell into the trap of equating activities by a particular type of insurance agency to those activities influencing the relationship between a policyholder and an insurer as anticipated by the McCarran-Ferguson Act. The state court reasoned:

> These state statutory provisions were enacted by the state legislature to protect and regulate the relationship between insurer and insured at a very basic level by barring a certain industry, namely the banking industry, from selling all types of insurance....
>
> Clearly, the relationship between insurer and insured, the authority of an individual or entity to sell a certain type of insurance policy, and other activities of individuals or entities acting in the capacity of insurance companies relate so closely to their *status as reliable insurers* that they must be placed in the same class as the types of activities that are at the core of the "business of insurance."

Petition at 22a-23a.

The most significant flaw in this reasoning of the state court is its grouping together of insurance underwriters with insurance agencies as "insurers" in determining whether the referenced statutes regulate the relationship between an insurer and a policyholder. Such a grouping ignores the most basic difference between an underwriter and an agency: only an underwriter (as opposed to an agent) assumes a risk from having issued an insurance policy. Accordingly, as between an insurance agency and an underwriter, only the activities of an underwriter -- and not those of an agent, or an entire category of potential agents -- can affect the risk relationship between the insurer and the policyholder.

The state court's references in the quoted material to "insurance companies" and "reliab[ility]" signal that the state court was under this mistaken impression that the involvement by a specific type of insurance agency (in this case, a subsidiary of a national bank) in the creation of the insurer-policyholder relationship could affect the reliability of an insurer and, therefore, the relationship between the two parties to the insurance contract. This confusion had a disastrous effect on the outcome of the state court's analysis.

Clearly, the involvement of a particular type of insurance *agency* in creating a relationship between a policyholder and an insurer does not in any way affect that relationship, the central aspect of which is the viability of the *insurer*. One simply has nothing at all to do with the other. Moreover, "[e]xcluding a person from participation in an activity ... is different from regulating the *manner* in which the activity is conducted. The

former is the regulation of the person; the latter is the regulation of the activity." *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994) (emphasis added). The state court is simply without the authority to regulate a person when that person is a national bank or is its insurance subsidiary (as here) acting pursuant to authority granted by a federal statute.

In comparison, the Louisiana statutes do not attempt to regulate the substance of the risk-based relationship between an insurer and a policyholder[5] (or the performance under the contract defining that relationship); they improperly regulate only *how* that relationship comes about and who is allowed to create it.

The state court's reliance on *Fabe* is badly misplaced, since *Fabe*'s holding clearly and solely affects insurance underwriting, not agency, activities. It in no way can be read to suggest, as the state court apparently believed, that any and all activities of an insurance agency in helping create a relationship between an insurer and a

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[5] *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), sets forth the three factors the Court uses in determining what constitutes the "business of insurance" under the McCarran-Ferguson Act:

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. at 129 (emphasis in original).

policyholder affect that relationship to such an extent so as to preempt specific federal statutes to the contrary.[6] The context of *Fabe* indicates, rather, that in determining the reach of McCarran-Ferguson, the central question involves whether the activity regulated under the state statute could impinge in any relevant way on the risk-based relationship between an insurer and a policyholder, not that between a policyholder and an agent, who is entirely excluded from the risk equation.

II. CONFLICTS WITH GOVERNING PRECEDENT

Even assuming Louisiana's statutes *regulate* the business of insurance under the McCarran-Ferguson Act, the state court ruling conflicts with governing precedent of this Court regarding the second test required under 15 U.S.C. Section 1012(b) -- namely, whether 12 U.S.C. Section 92 "*specifically relates to* the business of insurance" and, therefore, preempts a state statute that otherwise survives federal preemption under the first test of Section 1012(b).

The second test of Section 1012(b) says that a statute "*regulat[ing]* the business of insurance" still must

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[6] Moreover, *Fabe* noted that the Arizona statute at issue in *SEC v. National Sec.* was only "saved" from federal preemption by McCarran-Ferguson because it contained a provision that required the Arizona Director of Insurance, prior to approving a merger between two insurance companies, to "make sure that the proposed merger 'would not "substantially reduce the security of and service to be rendered to policyholders."'" *Fabe*, 113 S. Ct. at 2208 (citations omitted).

give way to contrary federal law, where the federal law "specifically *relates* to the business of insurance." 15 U.S.C. § 1012(b) (1988) (emphasis added).

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), provides useful guidance concerning the difference between a statute that *regulates* an activity as opposed to one that *relates* to the activity. "Relating to" means "having a connection with or reference to." *Id.* at 383. *Morales* noted that Congress' use of the term "relate" has a broader meaning than that of the term "regulate." *Id.* at 383-84. They are not interchangeable.

In *United States Dep't of Treasury v. Fabe*, this Court addressed the meaning of the term "specifically relates" through its "clear statement" rule: "[S]tate laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute *specifically requires* otherwise." *Fabe*, 113 S. Ct. at 2211. The legislative history of the McCarran-Ferguson Act, upon which the *Fabe* majority relied, confirms that Congress did not demand that the federal statute have more than a mere "relation" to insurance for the federal statute to trump the state insurance law, as long as that relationship is explicit. Concerning the first clause of Section 2(b) of the McCarran-Ferguson Act (Section 1012(b)), Senator Ferguson said:

> "What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to *interstate commerce*, or if there is a law now on the statute books relating in

> some way to interstate commerce, it would not apply to *insurance*. We wanted to be sure that the Congress, in its wisdom, would act specifically with reference to insurance in enacting the law." 91 CONG. REC. 1487 (1945). This passage later confirms that "no existing law and no future law should, *by mere implication*, be applied to the business of insurance...."

113 S. Ct. at 2211 n.7 (emphasis added) (citation omitted).

The state court, however, misinterpreted *Fabe*'s "clear statement" rule interpreting the McCarran-Ferguson Act; it believed that the Act required that the federal law "*regulate* the business of insurance." Petition at 25a. In doing so, the state court concluded that "[o]ther than the provision that national banks may act as insurance agents in small towns, there is *no other language* in Section 92 dealing with insurance or the regulation thereof."[7] Petition at 25a (emphasis added). This is a remarkable conclusion, remarkable in its blindness to a clear grant of power by Congress and to its significance under the McCarran-Ferguson Act. On the contrary, Congress clearly referred to insurance in enacting Section 92, and

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[7] Notably, the lower court found that in "[e]xamining the language of 12 U.S.C. § 92, we find that there is nothing in the language to indicate that it *regulates* the business of insurance." Petition at 25a (emphasis added). The court obviously confused the first test of section 1012(b) (requiring the state statute to *regulate* the business of insurance) with the second test (requiring only that the federal statute *specifically relate* to the business of insurance).

no state court can credibly deny it. (In fact, the word "insurance" appears five times in the statute.) Notably, Section 92 states in relevant part:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association ... may ... act as the agent for any fire, life, or other *insurance* company ... by soliciting and selling *insurance* ....

12 U.S.C. § 92 (1994).

Moreover, the state court overlooked another recent decision decisively reconfirming federal supremacy within the McCarran-Ferguson context, which would have assisted it in correctly interpreting whether or not Section 92 relates to the business of insurance. In *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993), the Court considered whether provisions in the Employee Retirement Income Security Act (ERISA) concerning generally applicable fiduciary standards likewise applied to an insurance company's oversight of certain annuity contracts in the face of conflicting state insurance law. *Id.* at 521. In addressing this issue, the Court first considered whether McCarran-Ferguson required ERISA to yield to a conflicting state law. *Id.* The Court held that it did not, finding that ERISA -- while clearly not an "insurance law" -- "'obviously and specifically *relates* to the business of insurance.'" *Id.* (emphasis added) (citation omitted). Furthermore, the Court found federal preemption notwithstanding that ERISA *itself* contains a provision

that saves certain state insurance laws from preemption. The Court concluded that it had no "basis for concluding that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis. State law governing insurance generally is not displaced, but 'where [that] law stands as an *obstacle* to the accomplishment of the full purposes and objectives of congress,' federal preemption occurs." *Id.* at 525-26 (emphasis added) (citation omitted). Here, preemption of Section 92 by Louisiana's banking statutes would be an "obstacle" to Congress' objectives in enacting Section 92. *Fabe* preceded *John Hancock*, which confirmed earlier preemption analysis and is the Court's latest expression on the same controlling point and should now be followed.

Accordingly, the Court should grant certiorari to correct the erroneous decision by the state court interpreting this important federal question.

CONCLUSION

For all the reasons set forth herein and in the Petition for Writ of Certiorari, the American Bankers Association, *et al.*, as *amici curiae* and on behalf of their members, respectfully urge the Court to grant the Petition.

Respectfully submitted,

James T. McIntyre
Chrys D. Lemon
MCNAIR LAW FIRM, P.A.
1155 15th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 659-3900
Of Counsel and
Attorneys for Banks in Insurance, Inc.

John J. Gill III
Counsel of Record

Michael F. Crotty
Mathew H Street
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5026

Mary E. Arceneaux
LOUISIANA BANKERS ASSOCIATION
P.O. Box 2871
Baton Rouge, LA 70802
(504) 387-3282

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FIRST ADVANTAGE INSURANCE, INC., *et al.*,
Petitioners,
v.
DOUGLAS D. GREEN,
COMMISSIONER OF INSURANCE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal for the First Circuit, State of Louisiana

RESPONDENTS BRIEF IN OPPOSITION

JULIE A. FUSILIER
Post Office Box 908
Baton Rouge, Louisiana 70821
(504) 344-0037
Counsel for the Louisiana Commissioner of Insurance

ANN M. KAPPLER *
SCOTT A. SINDER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000

W. SHELBY MCKENZIE
TAYLOR, PORTER, BROOKS & PHILLIPS
P.O. Box 2471
451 Florida Street
Baton Rouge, Louisiana 70821
(504) 387-3221
Counsel for the Insurance Agents

* Counsel of Record

July 28, 1995

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On Petition for Writ of Certiorari to the Court of Appeal for the First Circuit, State of Louisiana

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RESPONDENTS BRIEF IN OPPOSITION

Respondents Douglas D. Green, Louisiana Commissioner of Insurance, the Louisiana Association of Life Underwriters, the Professional Insurance Agents of Louisiana, the Independent Insurance Agents of Louisiana (the last three collectively as the "Insurance Agents" and with the Commissioner as "Respondents") respectfully respond to Petitioners First Advantage Insurance, Inc. and First National Bank of Denham Spring's Petition For A Writ of Certiorari to review the judgment of the State of Louisiana's Court of Appeal for the First Circuit entered in this action.

STATEMENT OF THE CASE

The judgment entered by the state court of appeal is correct. Nevertheless, Respondents agree that the Louisiana state court's decision and the United States Court

of Appeals for the Eleventh Circuit's decision in *Barnett Bank of Marion County, N.A. v. Gallagher*, 43 F.3d 631 (11th Cir. 1995) (*reprinted in* Petition for Writ of Certiorari ("Cert. Pet.") Appendix ("Pet. App.") F at 79a-94a), *cert. petition filed* No. 94-1837 (May 8, 1995), conflict with the judgment entered by the United States Court of Appeals for the Sixth Circuit in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) ("*Owensboro*") (*reprinted in* Pet. App. D at 50a-79a), *cert. petition filed* No. 95-74 (July 7, 1995). Petitions for Writs of Certiorari have now been filed in all three cases.[1] The issue is of significant importance to both the banking and insurance industries, and is likely to arise in other States. Indeed, a case is currently pending in a federal district court in Connecticut concerning the application of that State's restrictive insurance law to national banks. *See Shawmut Bank Connecticut, N.A. v. Googins, et al.*, No. 3:94CV146(RNC) (U.S.D.C. D. Conn.).

ARGUMENT

For the reasons delineated below, Respondents urge this Court to resolve the conflict by granting the Petition filed in the *Barnett* case and either denying the Petition filed herein or holding this Petition pending resolution of *Barnett*.

I. THE ISSUE PRESENTED.

As recognized by the courts and Congress, regulation of the insurance industry in this country has been reserved for the States. At issue in this case is the authority of the Louisiana Commissioner of Insurance (the "Commissioner") and other state insurance commissioners around the country to exercise their traditional police power to regulate the sale of insurance. The same fundamental question is at the heart of this case, *Barnett* and

[1] The Insurance Agents' counsel represent the insurance agent association parties in all three of these cases.

Owensboro: Who may regulate insurance activities, including determining which entities may be licensed to sell insurance in Louisiana and other States? Is the State Legislature the final determinant, exercising its authority through statutes implemented and enforced by the Commissioner of Insurance? Or can the federal government *sub-silentio* dictate how insurance activities are conducted in a State?

Like any other potential insurance agent, banks (and their subsidiaries) are subject to the licensing requirements of state law. A central provision of Louisiana law, LSA-R.S. 6:242(A)(6)(a), prohibits all banks from selling or soliciting the purchase of general forms of insurance. In addition, LSA-R.S. 6:121(B)(2), 6:242(A)(6), and 6:513 flatly prohibit bank holding companies and their subsidiaries, including state and national banks, from selling broad forms of insurance. In enacting these laws, the State of Louisiana, as the primary regulator of the business of insurance within the State of Louisiana, was forced to grapple with the difficult consumer protection issues posed by bank sales of insurance. The district court in *Barnett* discussed some of these problems at length:

> For example, in order to make a profit on automobile loans or home mortgages, the insurance agents may incur business they might otherwise reject because they would be pressured by the bank to do so in order to consummate the bank's loan transactions. This might lead to the over-insurance of risky business, which could result in the insolvency of the insurer.
>
> Additionally, and notwithstanding the existence of specific prohibitions on coercive credit extension, the Court finds that loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-length relationship be maintained among the bank,

> the loan officer and the insurance agents. The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders.

Barnett Bank of Marion Co. N.A. v. Gallagher, 839 F. Supp. 835, 842 (M.D. Fla. 1994), *aff'd*, 43 F.3d 631 (11th Cir. 1995) (*reprinted in* Pet. App. F). Many other States have made similar policy decisions to maintain some degree of separation between banking and insurance. Indeed, as Petitioners note, at least fourteen other States have laws like Louisiana's that restrict banks from being licensed to sell general forms of insurance.[2]

In their Petition for Certiorari, Petitioners argue that such licensing prohibitions are pre-empted by Section 13 of the Federal Reserve Act, 12 U.S.C.A. § 92 (1995 Supp.),[3] which otherwise permits a national bank "located and doing business in a place in which the population does not exceed 5,000 inhabitants" to act as an agent in the sale of general forms of insurance. The Louisiana Court of Appeal unanimously disagreed with Petitioners. The Court concluded that Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), dictates that Section 92—a law that regulates the business of national banks—may not be interpreted to supersede or pre-empt Fla. Stat. 626.988—a law "enacted for the purpose of regulating the business of insurance." *See* Pet. App. A.

II. THE McCARRAN-FERGUSON ACT—LEAVING REGULATION OF THE BUSINESS OF INSURANCE TO THE STATES.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, makes clear, as a matter of federal law, that the

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[2] *See* Cert. Pet. at 8 & n.2.

[3] This provision is commonly known as "Section 92" and will be referred to as such herein. *See United States Nat'l Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 113 S.Ct. 2173 (1993) (discussing the tortured history of this provision).

States are the penultimate authority in the insurance realm unless Congress intentionally and expressly overrides that authority. Section 2(a) of McCarran is explicit:

> The business of insurance, *and every person engaged therein*, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

15 U.S.C. § 1012(a) (emphasis added). McCarran's Section 2(b) further provides that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b).[4] This law, originally enacted in 1944, did not articulate a new federal policy but instead sought to ensure that the States were permitted to remain the primary regulators of the business of insurance.

Until 1944, it had been universally understood that the States maintained exclusive control over the regulation of insurance. *E.g., United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). This axiom of state regulation had existed at least since 1869, when the Supreme Court decided *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). *Paul v. Virginia* involved an appeal by an insurance agent from a fine imposed for selling coverage for a New York insurer that was not properly licensed in Virginia. In disposing of the agent's argument

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[4] As even the "Declaration of Policy" provision of McCarran clarifies,

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that *silence on the part of the Congress shall not be construed to impose any barrier* to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (emphasis added).

that Virginia licensing laws violated the Commerce Clause of the U.S. Constitution, the Court held that "[i]ssuing a policy of insurance is not a transaction of commerce." *Id.* at 183. Cases following *Paul v. Virginia* held that not only the issuance of a policy, but the entire business of insurance, was *not* commerce regulable by Congress. *E.g.*, *Hooper v. California*, 155 U.S. 648, 649 (1895); *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 506 (1913). Consistent with this case law, Congress had repeatedly refused to extend federal authority over the insurance business, concluding that the regulation of the insurance business was beyond Congress' power. *See, e.g.*, Sen. Rep. No. 4406, 59th Cong., 1st Sess. (1906); H.R. Rep. No. 2491, 59th Cong., 1st Sess., 12-25 (1906).

All this changed in 1944 with the United States Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), a case cited by the Louisiana Court of Appeal, by the Eleventh Circuit in *Barnett* and by the *Owensboro* dissent (but, notably, not by the *Owensboro* majority). In upholding a criminal indictment for alleged Sherman Act violations, the Court in *South-Eastern* held, for the first time, that an insurance company was subject to the federal antitrust laws. The decision "naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry." *Fabe*, 113 S. Ct. at 2207. Congress reacted by enacting the McCarran-Ferguson Act. *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960). McCarran restored oversight of the insurance industry to the States, except with regard to antitrust issues where a State had failed to act. 15 U.S.C. §§ 1011 *et seq.*

As this Court has explained, McCarran "transformed the legal landscape by overturning the normal rules of pre-emption":

> Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) reverses this by imposing what is, in effect, a clear statement rule, *a rule that state laws enacted "for the purpose of*

> *regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.*

Fabe, 113 S.Ct. at 2211 (emphasis added). Disagreement over the parameters of the first prong of this test—determining whether a state law was enacted "for the purpose of regulating the business of insurance"—has created the conflict this Court must now address.

III. THERE IS A SQUARE CONFLICT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

Every court to consider the question has concluded that Section 92 does not "specifically relate to the business of insurance" under Section 2(b) of McCarran. *See* Pet. App. A at 25a-27a; *Barnett*, 43 F.3d at 637 (Pet. App. F at 93a-94a); *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992), *aff'd on other grnds.*, 44 F.3d 388. There is complete uniformity on this point.

The conflict arises regarding the first inquiry under McCarran. The fundamental disagreement between the Louisiana state court and the Eleventh Circuit on the one hand, and the Sixth Circuit on the other hand, is whether state laws that exclude banks from being licensed to sell insurance are "enacted for the purpose of regulating the business of insurance." The Eleventh Circuit and the Louisiana Court of Appeal disagree with the Sixth Circuit both about whether such laws may be enacted "for the purpose of regulating the business of insurance" and about the proper test to make this determination.

The *Owensboro* majority, purporting to apply the standards developed by this Court in the course of construing McCarran's *antitrust* clause, *see Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), flatly held that "[e]xcluding a person from participation in an activity [] is different from regulating the manner in which it is conducted." *Owensboro*, 44 F.3d at 392 (Pet. App. D at 60a). Based on this holding, the *Owensboro* majority concluded that *any* state law that prohibits a bank from

being licenced to sell insurance *cannot* be a law enacted "for the purpose of regulating the business of insurance" within the meaning of McCarran. *Id.*

The Louisiana Court of Appeal and the Eleventh Circuit reached an opposite conclusion through the application of the test developed by this Court in *Fabe*. In *Fabe*, the Court emphasized that the scope of the first clause of Section 2(b) is significantly different from the antitrust clause to which the *Owensboro* majority looked. *See* 113 S. Ct. at 2210. The general pre-emption clause of McCarran is very broad and encompasses all state laws that have the "end, intention, or aim of adjusting, managing, or controlling the business of insurance." *Id.* at 2210 (citation omitted). In articulating this standard, the *Fabe* Court relied primarily on the only other Supreme Court decision addressing the provision, *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969). The *National Securities* Court had concluded that, at its core, the McCarran exemption broadly encompasses state laws "aimed at protecting or regulating th[e] relationship [between insurer and insured], directly or indirectly." *National Securities*, 393 U.S. at 460. Based on this, the *Fabe* Court held that the Ohio bankruptcy priority statute at issue was "enacted for the purpose of regulating the business of insurance" because it was "designed to further the interests of policyholders." *Fabe*, 113 S. Ct. at 2208, 2212.

Based on the factual record created before the trial court and state court case law interpreting the state law provision, the Eleventh Circuit concluded in *Barnett* that Florida's prohibition on bank licensure to sell insurance was enacted "for the purpose of regulating the business of insurance" because "it protects policyholders." *Barnett*, 43 F.3d at 636 (Pet. App. F at 91a). From this determination, the Eleventh Circuit concluded that, " '[u]nder the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interests of policyholders.' " *Id.* (quoting *Fabe*, 113 S.Ct. at 2208).

The Louisiana Court of Appeal adopted the Eleventh Circuit's reasoning to conclude that the Louisiana bank-insurance agent licensing prohibition also is protected from pre-emption by McCarran. *See* Pet. App. A at 24a-33a. In reaching this conclusion, the Louisiana court, like the Eleventh Circuit, relied upon this Court's *Fabe* analysis and on the *National Securities* Court's prior analysis of the parameters of McCarran's Section 2(b). Pet. App. A at 19a-24a. In dissent, Sixth Circuit Judge Batchelder argued that the *Owensboro* majority should have done the same. *See Owensboro*, 44 F.3d at 394-97 (Batchelder, J., dissenting) (Pet. App. E at 62a-78a).

The import of the Sixth Circuit opinion—reached without any meaningful review of the purpose underlying the enactment of the Kentucky provision—is to impose a blanket rule to the effect that such laws cannot be found to have been enacted for such a purpose. The Louisiana Court of Appeal and the Eleventh Circuit reached contradictory conclusions only after conducting complete reviews of Louisiana's and Florida's proffered purposes for enacting their licensing prohibitions. The Louisiana Court of Appeal and the Eleventh Circuit utilized a carefully considered analysis consistent with this Court's precedents and the federal policies embodied in the McCarran-Ferguson Act. The Sixth Circuit did not. . . . .

IV. RESOLUTION OF THIS SQUARE CONFLICT IS ESSENTIAL BUT *BARNETT* PROVIDES THE BEST VEHICLE FOR THAT RESOLUTION.

As noted by Petitioners and at the outset of this brief, the laws of at least 15 States preclude national banks from selling insurance under Section 92 absent pre-emption. Unless this Court resolves the conflict, the two States located in the Sixth Circuit that have such laws (Kentucky and Tennessee) appear to be precluded from applying them, while the one restrictive State located in the Eleventh Circuit (Florida) and the State of Louisiana will continue to enforce their prohibitions against national

bank insurance sales. There is no way to predict whether the other 12 States will be able to continue to enforce their prohibitions against national banks if challenged. A national bank in Connecticut already has initiated yet another action seeking a determination that the Connecticut prohibition on bank sales of insurance, as applied to national banks, is pre-empted by Section 92. *See Shawmut Bank Connecticut, N.A. v. Googins, et al.*, No. 3:94CV146(RNC) (U.S.D.C. D. Conn.). Other challenges will undoubtedly follow. This Court cannot permit different standards to be applied to national banks in each of these cases merely by virtue of their location in different States,[5] nor can it condone the uncertainty that has been created for both national banks and state insurance commissioners throughout the country by failing to resolve the conflict that now exists.

The *Barnett* case, however, provides the best vehicle for the Court to address this conflict because it is the only case in which a record regarding a State's purpose in enacting its licensing prohibition has been developed. It is therefore the only case in which the Court can fully examine the import of McCarran's "purpose" inquiry and adequately evaluate the Sixth Circuit's determination that laws which preclude designated classes of persons or entities from being licensed to sell insurance are not—as a matter of law—enacted for the "purpose of regulating the business of insurance."[6] The Solicitor General,

[5] Or to branches of the same national bank located in different states.

[6] Petitioners' argument that the Louisiana Court of Appeal's determination that Section 92 is "permissive" positions this case as the best of the three for review by this Court is meritless. Although the Louisiana Court of Appeal did characterize Section 92 in this manner, it nevertheless concluded, as both the *Barnett* district court and the *Owensboro* majority previously had done, that Section 92 *would* pre-empt State licensing prohibitions under a traditional pre-emption analysis. *See* Pet. App. A at 17a; *Owensboro*, 44 F.3d at 391 (Pet. App. E at 57a-58a); *Barnett*, 839 F. Supp. at 841. The Louisiana Court of Appeal's "permissiveness"

filing an *amicus* brief on behalf of the United States and the Comptroller of the Currency in support of the petition in *Barnett*, has urged the Court to resolve the issue in the context of that case.

CONCLUSION

For the foregoing reasons, the Insurance Agents respectfully urge this Court to deny Petitioners' Petition for a Writ of Certiorari or to hold that Petition pending final resolution of *Barnett*.

Respectfully submitted,

JULIE A. FUSILIER
Post Office Box 908
Baton Rouge, Louisiana 70821
(504) 344-0037
Counsel for the Louisiana Commissioner of Insurance

ANN M. KAPPLER *
SCOTT A. SINDER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000

W. SHELBY MCKENZIE
TAYLOR, PORTER, BROOKS & PHILLIPS
P.O. Box 2471
451 Florida Street
Baton Rouge, Louisiana 70821
(504) 387-3221
Counsel for the Insurance Agents

* Counsel of Record

July 28, 1995

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statement had no apparent bearing on its decision and fails to distinguish this case from either *Barnett* or *Owensboro*.